(28,319)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 364.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1921.

1 Court of Claims.

No. 34452.

THE PORTSMOUTH HARBOR LAND & HOTEL COMPANY, a Corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, Deceased; S. Ellery Jennison, and Mary M. Jennison.

VS.

THE UNITED STATES.

I. *History of Proceedings.*

On February 10, 1920, the plaintiffs filed their original petition.

On August 2, 1920, on motion made therefor, the defendants were allowed to withdraw the general traverse and file a demurrer to the petition.

On August 2, 1920, the defendants filed a demurrer to the petition.

On March 7, 1921, the demurrer was argued and submitted, and thereupon ordered that the demurrer be sustained with leave to plaintiffs to amend their petition within thirty (30) days.

On March 10, 1921, the plaintiffs amended their petition by adding an additional paragraph (7*a*). Said petition as amended reads as follows:

2 II. *Petition with Exhibits A, B, C, D, and E, Filed February 10, 1920, as Amended by Additional Paragraph (7a), Filed March 10, 1921.*

Petition with Exhibits A, B, C, D, and E.

1. The claimants herein are all citizens of the United States.

2. The claimants respectfully represent that the United States, acting through the War Department, has the right to acquire land and interests in land for the purpose of coast defense fortifications either by purchase or by condemnation, or by the exercise of what is known as indirect eminent domain, to-wit; the power of taking by actual use, or by the exhibition of an intent to use, and thereby to debar the former owners from the use and full enjoyment thereof; and that under the exercise of this right the land may be taken over permanently, or for temporary purposes, subject only to the requirement of Article V of the Amendments to the Federal Constitution that due compensation shall be made to the owners thereof.

3 3. In pursuance of this power the United States has taken the use of the land of the claimants situate on Gerrish Island, Maine, adjoining a fort of the United States, said land being as shown on the map attached hereto and marked Exhibit "B," which claim-

ants pray may be taken as a part of this petition as fully as if inserted herein at this point.

4. The United States took the use of the land of the claimants beginning in the year 1902, by subjecting the said land to the domination of guns set up in a fort behind said land, which intervenes between said fort and the sea. The fort was set up by the United States to protect the people of the United States and for their benefit. The guns of the fort dominated the land of the claimants and frightened away the guests and friends of the claimants by commanding the land and by constantly threatening danger to those on the land, and have heretofore made and do still make impossible the continuous and peaceful use and enjoyment of the said land by these claimants formerly entitled thereto.

5. The guns were pointed at and over said land from time to time continuously arrogating to the United States the use of said land and making the peaceful use and enjoyment of said land by claimants impossible, being always subject to interruption at the will of the United States. This condition continued from 1902 to 1918, during which period the claimants have been deprived of the use of their land as aforesaid, but have received no compensation, either as rent for the use of the land or as damages for the loss which they have sustained. In the year 1919, the United States, through the War Department, manifested an intent to continue permanently to dominate and use the property, and to escape from any other or further claim for compensation by offering to purchase a part thereof, with the intention of splitting the claims against the United States
4 for the use of the said land, of setting the parties against each other, and of escaping liability under the Constitutional provision referred to in paragraph 2 hereof.

6. Under the law of the United States as declared by the Supreme Court of the United States in the proceedings brought by these claimants heretofore (Peabody vs. U. S., S. C., U. S., Oct. Term, 1912, No. 695) the United States will be held to have taken the land in question on manifesting an intention to subordinate the strip of land between the battery and the sea to the right to fire across it whenever the Government may wish to do so, with the result of depriving the owner of its profitable use. The Supreme Court of the United States held the actions of the United States in setting up said guns, and firing them on three occasions in 1902 were, taken alone, not conclusive of the purpose of the United States thus to subordinate the land. Thereafter, the United States having fired on other occasions, and continually pointing the guns at and across the property, the claimants conceived that the purpose of the United States to subordinate the property was now evident, and that the taking begun in 1902 had now been consummated brought an action in the Court of Claims (No. 33,079 in the December Term, 1914). The petition in said suit attached hereto and marked Exhibit "C" is requested to be taken as if incorporated herein at this point, and all the material facts and descriptions

therein contained are hereby reaffirmed and stated by your petitioners. The United States denied that the guns had been fired, or the land taken, and after evidence the Court found that the guns had been fired on three more occasions; and that they had been pointed over the property in various directions, but that there was no intention of firing the guns when so pointed except when they had actually been fired. At that time the claimants brought no claim for rent or use of the property and the Court held that no part of the claimants' property had been taken.

5 7. During the pendency of the said suit the United States having recognized a state of war with Germany dismounted the guns from said fort with the intention, as claimants were informed and believe, of sending said guns to France. On the termination of hostilities the United States intended to set up said guns or guns of heavier caliber on the same or similar gun mounts, maintaining, however, the gun mounts, carriages and other appurtenances of said fort as before, also establishing a fire control station and service for the use of said fort and upon the land of the said claimants; subordinating the land to the use of the fort and depriving claimants of the use and enjoyment of said land. The United States is now maintaining the gun carriages and is about to set up new guns at this place, and the fire control station is still available.

7*a*. Since the termination of hostilities, and subsequent to the filing of the petition which is hereby amended, the United States have set up heavy coast defense guns in the fort hereinbefore described, situated upon the face of the earth and in relation to the claimants' land as shown upon the inset map of Exhibit "B" attached hereto. And in so doing the United States have established the said fort and battery with the said guns as a part of the permanent establishment of the coast defense fortifications maintained by the United States for the protection of the United States and the inhabitants thereof. In so doing the United States have used and employed the land of the claimants as a part of the mask cover and hiding of the said guns and said fort, the said guns being disposed and situated so as to be concealed and protected by the said land of the claimants intervening between the said fort and the Atlantic Ocean. The United States have set up the said guns so as to fire over and across the land of said claimants and so as to point the said guns without discharging projectiles there-
6 from, but as if the said guns were about to be fired, over and across the said land, and have set the guns as aforesaid with the intention of firing and of pointing them as aforesaid, over and across the land of the said claimants; and without intending to fire or being able to fire the said guns to sea except over and across the said land. And the United States have used the said land of the said claimants for the establishment of a fire control station and service for the use of said fort. The United States have since setting up the said guns as aforesaid, at frequent intervals in the use of the said fort, raised the said guns and pointed them as afore-

said, over and across the said land, and have, further, in the use of the said fort, dischargeed all of the said guns as aforesaid, on or about the eighth day of December, 1920, over and across the said land, thereby, and by the raising and pointing as aforesaid, and by the re-establishment and use of the fort as aforesaid, and by the use of the said land for the establishment of a fire control station and service, as aferosaid, and by the establishment of the fort and the other firings of the said guns at other times heretofore as set forth in Exhibit "C" of the petition, and by the other acts done in and about the fort and upon the land of the claimants as aforesaid, have used and subordinated the said land to the use of the fort and taken from the claimants all substantial use and enjoyment of such land, and have greatly injured and damaged the said land and the buildings thereon, and made the said property uninhabitable and without value for any of the purposes for which it is well adapted, except as an adjunct for the said fort.

8. Your petitioners aver that the reasonable rent for the use of said property based upon its original value is Twenty Thousand Dollars ($20,000) per year, and that the United States was in equity and justice liable to pay the claimants Twenty Thousand Dollars ($20,000) per year from 1902 to the present date; that by reason of the operation of the Statute of Limitations the claimants can only recover for the six years immediately preceding the institution of this suit; and that during its use of the property the United States has never paid any sum of money whatsoever to the claimants; by virtue of the premises the United States is now indebted to the claimants for six years' compensation for the use and occupation of the land aforesaid amounting to One Hundred and Twenty Thousand Dollars ($120,000) and to damages in impairing the value of said land amounting to Two Hundred Thousand Dollars ($200,000).

9. Your petitioners invoke the equitable jurisdiction of this Court, and as in a separate count aver further that at the present time the United States has clearly manifested its purpose to subject the land permanently for the purposes of the fort aforesaid, and that this purpose is apparent from the maintenance of the fort since the termination of hostilities against Germany and Austria-Hungary; and your petitioners aver that under the law of the United States the petitioners have been put to successive actions as the purpose of the United States was gradually manifested. In the second action brought, the honorable Court of Claims, after handing down its findings of fact and judgment granted an immediate appeal to the Supreme Court of the United States, due to a mistake not to be attributed to your petitioners, and originating as set forth in the attached affidavit (marked Exhibit "D") of Frank W. Hackett, formerly the attorney of record herein (which is requested to be taken as if incorporated in full at this point) whereby the findings were not reviewed in the usual manner as on motion for new trial or rehearing. It is customary in this Court where there is any dis-

8 puted question on the findings of fact to hear the objections on a motion for a new trial. By reason of this omission the Court of Claims had no opportunity to correct the errors made in said findings, including those where inadvertently the Court was not guided by the proof submitted and made certain findings contrary to the proof and other findings stating as facts things contrary to physical possibility, e. g., Exhibit "A" containing certain of such findings as aforesaid, which is attached hereto and requested to be taken as if incorporated at this point.

Your petitioners call attention to the inequitable position in which they are left by the mistakes aforesaid and request that this Court in the exercise of its equitable powers review and set aside the findings of fact so far as they work inequity upon the petitioners, and correct the same in accordance with the facts, to-wit:

"That Fort Foster was constructed with the purpose of firing its guns over and across the plaintiffs' lands; and that no other suitable field of fire of said guns exists."

Your petitioners attach hereto a map correctly showing the topographic impossibility of the former finding, said map being marked Exhibit "B," and ask that it may be taken as incorporated at this point.

And your petitioners aver that there are other patent discrepancies and inadvertencies and request that the other findings be set aside and reviewed by this Court so that inequity may be prevented and justice may be done; and for a more particular account of these discrepancies and inadvertencies refer to Exhibit "E," consisting of the findings of fact with the said discrepancies noted thereon, which exhibit petitioners pray may be taken as incorporated herein at this point.

10. Your petitioners further state that the purpose of the United States having now been made clear by its actions in 1918 and
9 1919, as aforesaid, in preparing to set up new guns in the fort aforesaid, that they ought not to be put to a multiplicity of actions in the premises; and that the United States, having used and occupied the petitioners' land without claim of title or payment of rent from June 20, 1902, did on or about the 31st day of December, A. D. 1919, manifest its purpose and take said property; and your petitioners say that the value of said property as taken amounts to Seven Hundred Thousand Dollars ($700,000), to which your petitioners state should be added the sum of One hundred and Twenty Thousand Dollars ($120,000) as rent for the use and occupation.

11. The sum of Two Hundred Thousand Dollars ($200,000) as damages as aforesaid should, your petitioners aver, not be paid in addition to rent unless the United States should abandon said fort and cease its occupation and use of said land; in such case your petitioners pray the sum of Three Hundred and Twenty Thousand Dollars ($320,000), less the value of the property at the date of the

disestablishment of the fort. And your petitioners further aver that they are the owners of the claims against the United States herein set forth, and that no assignment or transfer of said claims or of any part thereof or interest therein has been made, and that said claimants are justly entitled to the amounts herein claimed against the United States after allowing all just credits and offsets; and that the claimants are all citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that the claimants believe the facts as stated in the said petition to be true.

12. Wherefore the claimants pray that this honorable Court will find that there is due to them the sum of Eight Hundred and Twenty Thousand Dollars [or else in the contingency hitherto indicated of the United States forthwith abandoning forever the use of said property for the fort as aforesaid, the sum of Three Hundred and Twenty Thousand Dollars ($320,000)] together with such other orders and findings of fact and law as shall in the premises be equitable, and meet and just; and that such other and further relief be granted to your petitioners that they may be relieved from their present state of hardship and misfortune, so far as the orders of this honorable Court can give relief under its equitable powers that justice may be done.

CHAUNCEY HACKETT,
Attorney of Record for Claimants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Chauncey Hackett, the attorney for the claimants, and makes oath that the facts herein stated are true to the best of his knowledge and belief.

Sworn and subscribed to before me this 10th day of February, 1920.

[SEAL.]

W. G. BADEN,
Notary Public, D. C.

EXHIBIT A.

Extract from Findings of Fact in Portsmouth Harbor Land & Hotel Company et als. vs. The United States, Court of Claims, No. 33,079, Filed February 25, 1918.

XV.

"Fort Foster was not constructed for the purpose of firing any of its guns over and across any of the plaintiffs' lands in time of peace, or of so firing them at all, except over the Government's own premises occasionally for testing purposes.

MAPS
TOO
LARGE
FOR
FILMING

12 EXHIBIT C.

In the Court of Claims, December Term, 1914.

No. 33079.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, a Corporation, et als.

vs.

THE UNITED STATES.

Petition.

1. The claimants, the Portsmouth Harbor Land and Hotel Company, a corporation, formed and existing under the laws of the State of Maine; Caroline E. Peabody, a single woman, a resident of Cambridge, County of Middlesex, Commonwealth of Massachusetts; Amory Eliot, a resident of Manchester, County of Essex, Commonwealth of Massachusetts, administrator of the estate of Mary Rantoul Peabody, deceased, formerly a resident of Cambridge, County of Middlesex, Commonwealth of Massachusetts; Samuel Ellery Jennison and Mary M. Jennison, his wife, residents of Kittery Point, County of York, State of Maine, respectfully represent as follows, to wit:

2. The claimants are all citizens of the United States, and residents respectively as stated in paragraph one hereof.

3. The claimants now have, proportionately to their ownership in the land hereinafter described at the time of the taking thereof by the United States, hereinafter set forth, and from the time of said taking have had, a just claim against the United States for the value of certain real estate, property, rights, privileges, and easements, and appurtenances thereto at Gerrish Island, County of York, State of Maine, and hereinafter referred to as the claimants' land, taken by the United States for public use in the instalment, maintenance and use of a battery of guns, three ten-inch and other guns of smaller calibre at said Gerrish Island, known as Fort Foster, and established as a part of the fortification of the United States, for which none of them have received any compensation from the United States.

The claimants' land is situated on Gerrish Island, County of York, State of Maine, immediately adjacent to and adjoining the land of the United States on which Fort Foster is established; and the said claimants' land borders upon the Atlantic Ocean, and upon the entrance of Portsmouth Harbor, adjacent thereto, and intervenes between Fort Foster and the Atlantic Ocean in such wise that
13 the guns of said fort cannot be fired to sea except over the intervening land of the claimants. If the guns are fired over that portion of the shore belonging to the Government reservation the fire of said guns is attended with great danger to the lives and property of the residents of the New Hampshire mainland, and

is likewise attended with great danger to a certain lighthouse of the United States known as Whaleback Light by the destruction of said lighthouse and the lives of those within and about the same.

4. The United States established said fort with the intention and purpose of firing the guns thereof as needful for practice or for defense, across the claimants' land, and in establishing said fort the United States intended and purposed to take the land of the claimants when it should become necessary to fire said guns for the purpose of transit of projectiles from said guns.

5. It was needful to the United States in the use of said fort to fire the guns thereof across the claimants' land at any and all times in times of peace, and at all times for practice to fire the guns across said land and through the column of air superincumbent thereon; and it was needful for the proper efficiency of said guns that the said guns be kept in readiness for accurate use by the United States and that they be used for practice from time to time continuously.

6. Said fort was established by the United States in the year 1900, and the guns therein set up in the year 1902 for the use of the United States and under authority of statutes duly enacted by the Congress.

7. The guns of said fort were discharged in times of peace by the United States in the year 1902 on or about the 22d day of June, and on or about the 25th day of September, respectively, at a target at sea, for the purpose of testing the carriages of the said guns. That between September 25, 1902, and February 20, 1905, repeated efforts were made to come to some settlement with the War Department but without success.

8. That on February 20, 1905, the present claimants brought suit in the Court of Claims against the United States. This suit was pending in the said court and on appeal in the Supreme Court of the United States, until December, 1913.

9. On or about November 23, 1914, in a time of peace, the United States for the public use discharged all of said guns over and across the claimants' land, and through the column of air superincumbent upon said land; and since then has from time to time fired said guns as aforesaid.

10. All the claimants' land was land adapted to use for a summer residence and hotel property of the best class, and of little or no value otherwise; and was so used by claimants until 1905 when, on account of the apprehension of claimants and of those whom they invited to use said land that any time said guns would
14 be fired over and across the said land, said land ceased to be used as a summer residence and hotel property and has since not been used for that purpose by claimants.

Said land, comprising the southern extremity of the State of Maine fronting on the sea and the harbor of Portsmouth, New Hampshire, adjacent thereto, is of great natural beauty, consisting

of rugged shore interspersed with sand beaches and gentle slopes of grass lawn, and certain groves of pine trees and elevations, the whole presenting especial attractions for summer residence. Said land contains a very valuable spring of pure water and a fine ice pond, a water supply system and four pumping stations, a hotel and eight cottages, stables, barns, ice houses, a steamboat pier, and other appurtenances, all of great value. Said land contains also a great number of sites for summer residences, of which a number were sold by your claimants at a price of not less than $3,333.33 per acre; and on certain of said sites sold by the claimants, expensive and beautiful summer residences were erected by the owners; and a number of said sites remain to be sold by the claimants. The area of the land belonging to the claimants was about two hundred acres, more or less. The said hotel and cottages were erected at a cost of not less than $75,000, not including certain buildings known as The Homestead, of considerable antiquity, which were on the land when it came into the possession of the claimants. Said land was laid out with roads and paths, and well kept until 1905, when, as aforesaid, by reason of the apprehension of the intention of the Government to fire with guns over said land, it became impossible to induce guests, tenants or purchasers to come on or to stay on said land.

10. On or about November 23, 1914, the United States took said land for the public use by discharging all of the said guns over and across it, and through the column of air superincumbent thereon, for the necessary purposes and use of the United States under the authority of Congress and by order of the War Department through the proper officers thereof.

From time to time the United States caused the said guns to be raised, trained on and pointed at and across claimants' land at the buildings thereon, as if to be fired at or over the same, thereby dominating and impairing the use of said land by the claimants..

11. That the value of the claimants' land taken as aforesaid, is fairly and reasonably not less than seven hundred thousand dollars ($700,000), of which sum claimants as aforesaid have received no part in compensation.

12. By the acts of the United States aforesaid, the claimants are deprived of their land, and the United States has the use and domination of said land for the necessary purposes of said fort.

15 13. The claimants are the only owners of the claim herein aforesaid as stated, and they have made no assignment or transfer of the same nor any interest therein, and they have at all times borne true allegiance to the United States, and have in no way aided or given encouragement to rebellion against the Government of the United States, and they are justly entitled to recover from the United States the amount here claimed after allowing all just credits.

14. The claimant, the Portsmouth Harbor Land and Hotel Com

pany, became and is now the owner in fee simple of the land for the taking of which compensation is sought, on or about the 20th day of August, 1902, by a deed bearing date 20th day of August, A. D. 1902, from one Samuel Ellery Jennison, which said deed was duly signed, sealed, acknowledged, delivered and recorded in book 525, page 293, of the Registry of Deeds of the County of York, State of Maine, a duly certified copy of which is attached hereto and named Exhibit A, and is requested to be considered a part hereof as fully as if incorporated herein at this point. The claimants, Amory Eliot and Caroline E. Peabody, are mortgagees of said land by virtue of deeds bearing dates respectively, the 30th day of December, 1897, the 3d day of February, 1914, and the 3d day of February, 1914, from S. Ellery Jennison, et ux., to Mary R. Peabody; the same being recorded in book 488, page 480, of the records of the Registry of Deeds of the County of York, State of Maine; from Amory Eliot, administrator of the estate of Mary R. Peabody (the same being recorded in book 629, page 105, of the records of the Registry of Deeds of the County of York, State of Maine); and from the Portsmouth Harbor Land and Hotel Company (the same being recorded in book 619, page 266, of the records of the Registry of Deeds, of the County of York, State of Maine) respectively; the grantee of the said deed dated December 30, 1897, being Mary R. Peabody, and the grantee of the two said deeds dated February 3d, 1914, being Caroline E. Peabody. All three of the said deeds here named attached hereto, and named respectively Exhibit B, Exhibit C and Exhibit D, and are requested to be considered as part hereof, as fully as if incorporated herein at this point. The claimants, Samuel Ellery Jennison and Mary M. Jennison, were owners in fee of said land up to on or about the date August 20th, 1902, when they conveyed the said land to the claimant, The Portsmouth Harbor Land and Hotel Company, as aforesaid. The title of said Samuel Ellery Jennison and Mary M. Jennison, his wife, was derived by purchase on or about the 22d day of May, A. D. 1883, by several deeds dated respectively, May 5th, May 12th and May 22d, 1883, and recorded in the Registry of Deeds of the County of York, State of Maine, as follows, respectively: Allen W. Burnham and Isabel G. Burnham to Samuel Jennison, May 5th, 1883, recorded in book 392, page 154; Allen W. Burnham, guard-
16 ian of Emily G. Burnham, to Samuel Jennison, May 12th, 1883, recorded in book 392, page 210; Allan W. Burnham and wife, to Samuel Jennison, May 22d, 1883, recorded in book 392 page 211, the original of all of which said deeds are in the possession of the claimants, who will produce the same at the proper time in evidence in this cause.

Wherefore the claimants pray that this honorable Court will find that there is due to them the sum of seven hundred thousand dollars, together with such other and further orders and findings of fact and of law as shall in the premises be warranted by and in conformity with law.

CHAUNCEY HACKETT,
Attorney of Record for Claimants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Chauncey Hackett, the attorney for the claimants, and makes oath that the facts herein stated are true to the best of his knowledge and belief.

Sworn and subscribed to before me this 11th day of June, 1915.

[SEAL.] J. CLARK MIDDLETON,
Notary Public, D. C.

EXHIBIT A OF PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That I Samuel Ellery Jennison, of Kittery in the County of York and State of Maine, in consideration of one dollar and other valuable considerations paid by the Portsmouth Harbor Land and Hotel Company, a corporation organized under the laws of the State of Maine and located at Portland in the County of Cumberland in said State, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Portsmouth Harbor Land and Hotel Company its successors and assigns forever, all the real estate together with the buildings thereon which I own on Gerrish Island, so called, in said Town of Kittery, containing one hundred and eighty-five acres, more or less, and bounded and described as follows:

Beginning at the Westerly end of Gerrish Island, at the water and the Southerly boundary of the United States Government Military Reservation, thence running Easterly by the line of said Reservation and lands of Joanna E. McClure, of the heirs of Edward F. Safford, of Joseph B. Warner, of the heirs of Ephraim C.
17 Spinney, of William C. Williams, and of the heirs of William M. Goodwin; thence Southerly by the land of the heirs of William M. Goodwin, to the Atlantic Ocean; thence running Westerly and Northerly by said Ocean and Portsmouth Harbor to the point of beginning, excepting and reserving from the premises as above described, however certain lots which have heretofore been conveyed therefrom to George H. Higbee, to Henry N. VanDyke, to Susanna Willard and others, to Olivia Flagg and to William L. White, as by the records of said several conveyances in the Registry of Deeds for said County of York will more fully appear.

The tract of land above described and conveyed is what was heretofore known as the "Seward Farm" and includes the "Hotel Pocahontas" so called and the lot of about twenty acres upon which it stands and it is also intended to include a tract of about seven acres of salt marsh, surrounded by land of the heirs of William M. Goodwin, with right of way thereto. For a more particular description of said "Seward Farm" reference is hereby made to a plan of the same made by Timothy Dame, surveyor, recorded in said York Registry of Deeds.

This conveyance is made subject to two mortgages thereon, one upon the said "Pocahontas Hotel" and lot to Mary R. Peabody for

the sum of twelve thousand Dollars ($12,000) and one to the Saco and Biddeford Savings Institution for twenty-two thousand dollars ($22,000) which mortgages the said grantee, by the acceptance hereof agrees to assume and pay.

The grantor further reserves the free use and occupation of the bargained premises, with all the rents, issues, revenues and profits thereof to himself for the remainder of the current summer season until the first day of October, A. D. 1902, without any liability for payment of rent to the grantee for such use and occupancy.

To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof, to the said Portsmouth Harbor Land and Hotel Company, its sucessors and assigns, to their use and behoof forever.

And I do covenant with the said Grantee its successors and assigns that I am lawfully seized in fee of the premises; that they are free of all incumbrances; except the two mortgages above specified that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my heirs, shall and will warrant and defend the same to the said Grantee its sucessors and assigns forever, against the lawful claims and demands of all persons except those arising under said mortgages.

In witness whereof, we the said Grantor, and Mary M. Jennison, wife of the said Samuel Ellery Jennison, in testimony of her relinquishment of her right of dower and all rights by descent
18 or otherwise in the above-described premises, have hereunto set our hands and seals this twentieth day of August in the year of our Lord one thousand nine hundred and two.

SAMUEL ELLERY JENNISON. [SEAL.]
MARY M. JENNISON. [SEAL.]

Signed, Sealed in presence of
ARTHUR F. BELCHER,
to S. E. J.
LENA M. PEDERSON.

STATE OF MAINE,
Cumberland, ss:

August 20, 1902, personally appeared the above-named Samuel Ellery Jennison, and acknowledged the above instrument to be his free act and deed.

Before me,

ARTHUR F. BELCHER,
Justice of the Peace.

Recorded according to the original received September 17, 1902, at 9h. 15m. A. M.

Attest:

JUSTIN M. LEAVITT,
Register.

STATE OF MAINE,
York, ss:

Registry of Deeds.

December 18, 1914.

A true copy as recorded in Book 525, page 293.
Attest:

ELMER J. BURNHAM,
Register.

EXHIBIT B TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That We, S. Ellery Jennison and Mary M. Jennison his wife of Kittery in the County of York and State of Maine, in consideration of Twelve Thousand Dollars, paid by Mary R. Peabody of Cambridge, in the County Middlesex and Commonwealth of Massachusetts, single woman, the receipt whereof we do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Mary R. Peabody, her Heirs and Assigns forever, a certain tract of land on "Gerrish Island" in the town of Kittery, York County and State of Maine containing twenty acres, more or less, being part of the "Seaward Farm," and having thereon the Hotel Pocahontas with the stables, water works, bath and boat-houses and all other erections and buildings thereon. Said tract is bounded thus: Beginning at the Southwesterly corner of land of George H. Higbee at an iron pin thence running
19 Northerly by said Higbee's land to the centre of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the centre of a corresponding stone post on the opposite side of said public way; thence Northerly, bounded Easterly by other land of said mortgagor, in a straight line and in the same course as that of the Westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land, Westerly, Southerly, and again Westerly to the seashore or ocean; thence by the shore and ocean Southerly and Easterly to a point on the line on the West of said Higbee's land, thence Northerly on said line to the iron pin and point of beginning.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Mary R. Peabody, her Heirs and Assigns, to their use and behoof forever.

And we do covenant with the said Grantee, her Heirs and Assigns, that we are lawfully seized in fee of the premises; that they are free of all incumbrances; that we have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that we and our Heirs shall and will warrant and defend the same to the said Grantee, her Heirs and Assigns forever, against the lawful claims and demands of all persons.

Provided nevertheless, That if the said S. Ellery Jennison, his Heirs, Executors or Administrators pay to the said Mary R. Pea-

body, her Heirs, Executors, Administrators or Assigns, the sum of Twelve Thousand Dollars in three years from the day of the date hereof, with interest on said sum at the rate of six per centum per annum, payable semi-annually, then this Deed, as also a certain promissory note bearing even date with these presents, given by the said S. Ellery Jennison to the said Mary R. Peabody to pay the sum and interest at the time aforesaid, shall be void, otherwise shall remain in full force. The grantor has the privilege of prepayment in sums not less than one thousand dollars on any interest day.

And the said Grantors hereby covenant and agree with the said Grantee that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by and of the methods now provided by law.

In witness whereof, we the said Grantors, and Mary M. Jennison, wife of the said S. Ellery Jennison in testimony of her relinquishment of her right of dower in the above described premises, have hereunto set our hands and seals this thirtieth day of December in the year of our Lord one thousand eight hundred and ninety-seven.

S. ELLERY JENNISON. [SEAL.]
MARY M. JENNISON. [SEAL.]

Signed, Sealed and Delivered in presence of
MOSES A. STAFFORD.

20 STATE OF MAINE,
York, ss:

December 30, 1897. Then personally appeared the above named S. Ellery Jennison and Mary M. Jennison and acknowledged the above instrument to be their free act and deed.

Before me,
[L. S.]

MOSES A. SAFFORD,
Notary Public.

Recorded according to the original received December 31, 1897, at 9h. 14m. A. M.
Attest:

JUSTIN M. LEAVITT,
Register.

EXHIBIT C TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

I, Amory Eliot, administrator of the estate of Mary R. Peabody, late of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, the mortgagee named in a certain mortgage from S. Ellery Jennison and Mary M. Jennison, his wife, of Kittery in the County of York and State of Maine, recorded in York Registry of Deeds, Book 488, Page 480, in consideration of one dollar paid by Caroline E. Peabody of said Cambridge, the receipt whereof

is hereby acknowledged, do hereby assign, transfer, and set over unto the said Caroline E. Peabody, the said mortgage deed dated December 30th, 1897, the real estate thereby conveyed, and the note and claim thereby secured.

To have and to hold the same to the said grantee and her heirs and assigns to their use and behoof forever; subject nevertheless, to the conditions therein contained and to redemption according to law.

In witness whereof, I hereunto set my hand and seal this third day of February, 1914.

AMORY ELIOT, [SEAL.]
Administrator of the Estate of
Mary R. Peabody.

FREDK. GUTTERSON.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, February 4th, 1914.

Personally appeared the above named Amory Eliot and acknowledged the foregoing assignment to be his free act and deed as administrator.

Before me,
[L. S.]

FREDERICK GUTTERSON,
Notary Public.

My Commission expires July 3, 1919.

21 Recorded according to the original received February 6, 1914, at 9h. 40m. A. M.

Attest:

FRANK D. FENDERSON,
Clerk of Courts,
Acting as Register of Deeds under the
Provisions of Chapter II, Section 8,
of the Revised Statutes of Maine.

STATE OF MAINE,
York, ss:

Registry of Deeds.

December 18, 1914.

A true copy as recorded in Book 629, Page 105.

Attest:

ELMER J. BURNHAM,
Register.

EXHIBIT D TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That The Portsmouth Harbor Land and Hotel Company, a corporation organized and existing under the laws of the State of Maine, and located at Kittery, in the County of York, in said State, in consideration of Two Thousand Dollars ($2,000), paid by Caroline E. Peabody, of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell and convey, unto the said Caroline E. Peabody, her Heirs and Assigns forever, a certain tract of land on Gerrish Island in the Town of Kittery, in said County of York and State of Maine, containing twenty acres, more or less, being a part of the "Seaward Farm" and having thereon the Hotel Pocahontas with the stables, water works, bath and boat houses, and all other erections and buildings thereon. Said tract is bounded thus:—Beginning at the Southwesterly corner of land of George H. Higbee at an iron pin; thence running Northerly by said Higbee's land to the center of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the center of a corresponding stone post on the opposite side of said public way; thence Northerly, bounded Easterly, by other land of said Mortgagor, in a straight line and in the same course as that of the Westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land, Westerly, Southerly, and again Westerly to the seashore or ocean; thence by the shore and ocean Southerly and Easterly to a point on the line on the West of said Higbee's land; thence Northerly on said line to the iron pin and point of beginning.

To have and to hold the same, with all the privileges and appurtenances thereof, to the said Caroline E. Peabody, her Heirs
22 and Assigns, to their use and behoof forever. And it do[es] covenant with the said Grantee, her heirs and Assigns, that It is lawfully seized in fee of the premises; that they are free of all incumbrances; except a prior mortgage of Twelve Thousand Dollars ($12,000) to Mary R. Peabody; that It has good right to sell and convey the same to the said Grantee to hold as aforesaid; and that It and Its successors will warrant and defend the same to the said Grantee, her Heirs and Assigns forever, against the lawful claims and demands of all persons.

Provided, nevertheless, that if the said Portsmouth Harbor Land and Hotel Company, its Successors or Assigns pay to the said Caroline E. Peabody, her heirs, Executors, Administrators or assigns the sum of Two Thousand Dollars ($2,000) in six months from the day of the date hereof, with interest on said sum at the rate of six per centum per annum, payable ——, then this Deed, as also a certain promissory note bearing even date with these presents, given by the said Portsmouth Harbor Land and Hotel Company

to the said Caroline E. Peabody to pay the sum and interest at the time aforesaid, shall both be void, otherwise shall remain in full force.

In witness whereof, The name and seal of said Corporation is hereunto affixed, countersigned by its President and Treasurer, duly authorized this third day of February, in the year of our Lord one thousand nine hundred and fourteen.

PORTSMOUTH HARBOR LAND & HOTEL CO., [L. S.]
By FREDERICK M. SISE,
President.
S. ELLERY JENNISON,
Treasurer.

STATE OF MAINE,
County of York, ss:

February 3d, 1914.

Then personally appeared the above-named Fred M. Sise, President, and S. Ellery Jennison, Treasurer, and acknowledged the foregoing instrument to be their free act and deed in their said capacities and the free act and deed of said Corporation.

Before me,

AARON B. COLE,
Justice of the Peace.

Recorded according to the original received February 6, 1914, a 9h. 40m.
Attest:

FRANK D. FENDERSON,
Clerk of Courts, Acting as Register of Deeds under the Provisions of Chapter II, Section 8, of the Revised Statutes of Maine.

23 EXHIBIT D.

Affidavit of Frank W. Hackett, Filed in Portsmouth Harbor Land & Hotel Co. et als., Appellants, vs. U. S., in the Supreme Court of the United States, No. 381, *Oct. Term,* 1918.

I, Frank W. Hackett, of Washington, on oath depose and say that my son Chauncey Hackett was associated with John Lowell, of Boston, as counsel in the case of Peabody et al. against the United States, which was brought in the Court of Claims, for the alleged taking of land and buildings on Gerrish Island, Maine, by the firing of guns from Fort Foster in Portsmouth Harbor over the complainants' land. This cas was decided by this Court, December, 1913 reported, 231 U. S., 530.

Mr. Chauncey Hackett had been associated with Mr. Lowell in preparing the case at bar which was brought in the Court of Claim

after and because the guns were again fired on several occasions from Fort Foster over the land in question in the Peabody suit.

That before this case was argued in the Court of Claims Mr. Chauncey Hackett had entered the service of the United States as an officer in the Reserve Corps of the Army. He is now serving abroad. For this reason I entered an appearance as local counsel. I knew nothing of the details of the case and, of course, took no part in the argument. I had gained an impression that in the event of an adverse decision it was Mr. Lowell's wish that an appeal be taken at once to this court, because each day's delay meant a serious loss to Mr. Jennison, the claimant. Going to the clerk's office of the Court of Claims I obtained the record and went straightway to the clerk's office of this court and filed it there. Upon returning to my office I found a letter from Mr. Lowell, from Boston, stating that he was going to move to have the findings in the Court of Claims amended. Had I been aware that the Court of Claims had found the value of the same land and buildings in 1902 to be $200,000, which in the present decision they find to be worth in 1914 $125,000 I should not have entered the appeal.

Perhaps I ought to add that my son and I occupied the same law offices, and I thus came to know something of the hardship imposed upon Mr. Jennison, the claimant.

FRANK W. HACKETT.

DISTRICT OF COLUMBIA, *ss:*

Personally appearing, Frank W. Hackett made oath that the above statement by him subscribed is true.

Before me this 12th day of April, 1918.

[SEAL.] CHARLES KEENE,
Notary Public.

24 EXHIBIT E.

The Court of Claims.

No. 34452.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, a Corporation, et als., Claimants,

VS.

THE UNITED STATES.

I.

"The Portsmouth Harbor Land and Hotel Co., hereinafter designated the 'claimant company,' is a corporation organized and existing under the laws of the State of Maine; Caroline E. Peabody is a single woman and a resident of Cambridge, Mass.; Amory Eliot, of Manchester, Mass., is the administrator of the estate of Mary R. Peabody, late a resident of Cambridge, Mass.; and Samuel Ellery Jen-

nison and Mary M. Jennison, his wife, are residents of Kittery Point, Me.

"All of the claimants are citizens of the United States.

II.

"At the time of the alleged taking of property by the United States herein complained of, the said Portsmouth Harbor Land and Hotel Co. was, and has been since August 20, 1902, the owner, by conveyance from the said Samuel Ellery Jennison and wife, of a certain tract of land in York County, Me., more particularly described as follows:

"All of that tract and parcel of land formerly known as the Seaward Farm on Gerrish Island, in the town of Kittery, county of York, State of Maine, containing 200 acres, more or less, with all the buildings erections and improvements thereon, and bounded as follows, to wit: Beginning at the west end of Gerrish Island at the water and southerly boundary of the United States military reservation thence running easterly by the line of said reservation and the lands of Joana E. McClure, of the heirs of Edward F. Stafford, of Joseph B. Warner, of the heirs of Ephraim C. Spinney, of William C. Williams, and the heirs of William H. Goodwin; thence southerly by the land of the heirs of William H. Goodwin to the Atlantic Ocean; thence running westerly and northerly by said ocean and Portsmouth Harbor to the point of beginning, excepting and reserving from the premises as above described, however, certain lots which have heretofore been conveyed therefrom to George H. Higbee, to Henry N. Van Dyke, to Susanna Willard, et al., to Olivia Flagg, and to William L. White. About 179 acres of this land lies above high-water mark, the remainder being between high water and low water.

25 III.

"Said land on its southerly and easterly fronts borders on the Atlantic Ocean, and on its westerly front borders on the entrance to Portsmouth Harbor, and is about three miles from the city of Portsmouth, N. H. It is especially adapted to use for summer resort purposes, and is otherwise of comparatively small value.

"Since the year 1885 portions of it have been devoted to summer-resort purposes, and at the time of the alleged taking of it by the United States in November, 1914, said land was improved by a large summer hotel known as the Hotel Pocahontas, built about 1885; a number of summer cottages, built between about 1885 and 1895; a pier adjacent to the said hotel; and a number of small buildings and other improvements appurtenant to said hotel and cottages. Said land, including the improvements thereon, was, at the time of the alleged taking, reasonably worth the sum of $125,000."

Comment: Undisputed evidence was that hotel was added to and remodeled in 1898. In Peabody vs. U. S., Court of Claims, No. 27,500 the value of the same land was found by the Court to be

~~$20,000~~ $100,000 in the year 1902. It was also found that the land was valueless except as a summer resort and its value as a summer resort was materially impaired by the presence of the Fort.

IV.

"The Saco & Biddleford Savings Institution, of Saco, Me., on June 21, 1915, was the holder of a mortgage upon the easterly 155 acres, more or less, of the land here in suit, executed by said Samuel Ellery Jennison and wife on January 22, 1900, to secure the payment to said savings institution of an indebtedness of said Jennison to it in the sum of $22,000. The said Jennison having long been in default in the payment of this indebtedness, said savings institution, on said June 21, 1915, foreclosed the mortgage and took possession of said land, which possession has since continued, the mortgagor's right of redemption not having been exercised within the time allowed therefor. Said land was bounded as follows: Beginning at an iron bolt set in stone at the seashore on the easterly line of land of G. H. Higbee, thence running northerly by said Higbee's land to the highway; thence from the northerly line of said way indicated by stone posts, northerly and parallel with the westerly boundary of said Higbee's land to the Government reservation; thence easterly by said reservation and lands of Joanna E. McClure, heirs of Edward F. Stafford, Jos. B. Warner, heirs of E. C. Spinney, Wm. C. Williams, and heirs of Wm. Goodwin; thence extending southerly by land of said Goodwin heirs to the Atlantic Ocean; thence
26 extending westerly by said ocean to the point of beginning, excepting therefrom lots sold to N. H. Van Dyke, Susanna Willard, et al., and Olivia M. Flagg, also the town way extending through the same. The summer cottages referred to in Finding III above are located on this tract of land; and said land, together with the improvements thereon, was at the time of the taking alleged in this cause worth the sum of $75,000."

Comment: This finding is irrelevant as to whether there has been a taking by the United States or an occupancy of the use of the land by the United States. The conclusion of law filed February 25, 1918, cannot rest on the fact of a mortgage being foreclosed on a part of the property. Any foreclosure or change of title would not be valid as against the United States. The taking by the United States or its occupancy of the use of the land having been begun in 1902, and the mortgagor in Maine being the owner of the legal title, any subsequent dealings between the mortgagor and the mortgagee could not operate to assign a claim against the United States.

V.

"The claimant Caroline E. Peabody is interested in the remaining and westerly 20 acres of land, more or less, of the 179 acres here in suit as mortgagee under a mortgage from the claimant company, dated February 3, 1914, to secure a debt to her from said company in the sum of $2,000; and she is also further interested in said land

to the extent of $12,000 as assignee of Amory Eliot, administrator of Mary R. Peabody, deceased, of an outstanding mortgage indebtedness of $12,000 against said 20 acres of land, incurred by said Samuel Ellery Jennison and wife on December 20, 1897, prior to their conveyance of said land to the claimant company. Said 20 acres of land, more or less, was bounded as follows: Beginning at the southwesterly corner of land of George H. Higbee at an iron pin; thence running northerly by said Higbee's land to the center of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the center of a corresponding stone post on the opposite side of said public way; thence northerly, bounded easterly by other land of said mortgagor, in a straight line and in the same course as that of the westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land westerly, southerly, and again westerly to the seashore or ocean; thence by the shore and ocean southerly and easterly to a point on the line on the west of said Higbee's land; thence northerly on said line to the iron pin and point of beginning.

"The pier and summer hotel referred to in Finding III above are located on this 20-acre tract of land, and said land, together
27 with the improvements thereon, was, at the time of the alleged taking of the same by the United States in 1914, of the value of $50,000."

Comment: The comment applicable to Finding IV is equally applicable. Finding- IV and V are contrary to the principle established by the Supreme Court of the United States in Grizzard vs. U. S., 219 U. S. 180.

This finding seems to rest on the theory that the property can be divided and considered in two or more sections. The same comment applies to the findings in regard to the area affected by the actual shooting of the guns and by the blast therefrom.

VI.

"Pursuant to appropriations by Congress for the establishment of a fortification on Gerrish Island, the United States, in May, 1873, purchased a tract of land containing approximately 40 acres on the west shore of said island and began the construction thereon of a battery which was to form a part of the defenses of Portsmouth Harbor. In 1876, however, work was suspended on account of the failure of Congress to provide the necessary funds for the prosecution of the work. In 1898, pursuant to an appropriation by Congress therefor, work was resumed and a fortification having a battery consisting of three 10-inch guns mounted on disappearing gun carriages, and a battery of two 3-inch rapid-fire guns, was constructed. The installation of these batteries was completed about June 30, 1901, and they were transferred to the artillery branch of the service on December 16, 1901, the fortification being named Fort Foster.

"This tract of land upon which Fort Foster is located lies immediately to the north of the western portion of the land of the claimant

company in suit in this case, the westernmost portion of the company's land being between the reservation and the sea. The fort is located back about 500 feet, northerly, from the shore line at the southwesterly corner of the reservation and about 300 feet from the nearest point of the claimant company's land, and is about 1200 feet distant from the company's said summer hotel to the southeast thereof, which is the nearest of the company's main buildings to the fort. The location of the reservation, fort, and battery with reference to the claimant company's said land, hotel, cottages, and pier is shown by the accompanying plat, which is hereby made a part of these findings of fact."

Comment: In no sense was the work resumed. The battery, which was begun in 1876, was a river battery, which was abandoned. The battery which was begun in 1898 was a totally new project arranged to fire out to open sea. The building of the ocean battery involved the destruction of the old works. The original plan for a river battery involved short range, small guns, firing across
28 the river, and not intended to fire across the claimants' land to open sea. The finding in its present shape conveys the impression that in some way the work in 1898 was a continuation of the old work. The second paragraph of the finding refers to a plat which is defective in that it does not show which is the river front and which is the ocean front of the island, nor does it show the range of the guns, nor does it correctly show the boundary between the parties.

VII.

"The guns of the 10-inch battery installed in Fort Foster have a range of fire and can be fired over and across practically all portions of the sea front of said land of the claimant company.

"If the dividing line between the claimant company's land and the Government reservation between high-water and low-water marks is a continuation in the same direction of the undisputed dividing line between said premises running down to high-water mark, as illustrated by the line A to I on said accompanying plat, none of the guns of Fort Foster could, with safety to the residents of adjacent shores, be fired toward the sea without the projectiles therefrom passing over and across some part of the company's land.

"If, however, said dividing line between high-water and low-water marks from the point of termination at high-water mark of the undisputed dividing line, is a line bisecting the angle resulting from lines diverging from said point of termination at right angles, respectively, to a base line drawn from the two shore corners of the tract of land in suit, and a base line drawn from the shore corners of the Government reservation, as illustrated by the line A to F on said plat, guns No. 1 and No. 2 could be fired to sea without endangering persons or property on adjacent shores. Gun No. 3, as at present installed in said fort, could not be so fired with safety except at long-range distances.

"In the conveyance to the United States of the land constituting said reservation, the said dividing line approaching the sea or harbor

on the south of the reservation was specified to extend westerly 'to the seashore,' and the description of the land conveyed terminated with the provision, 'together with the flats appurtenant thereto.'

"From about the year 1879 to about 1904 the owners or occupants of the land in suit here, for the purpose of preventing the wandering of cattle on or off said land, had a wire fence of more or less permanent character connecting at high-water mark with the westerly end of the south boundary fence of the reservation and continuing on in the same direction as said fence down to low-water mark, as indicated to the line A to I on the plat referred to above."

29 Comment: The finding is in the alternative although the evidence is undisputed that the boundary between the claimant and the United States was a straight line terminating at low-water mark.

VIII.

"Fort Foster was never garrisoned, and no target or practice firing was ever done there. Until the summer of 1917, when its guns were dismounted for removal and use elsewhere, its batteries had been continuously kept in serviceable condition for defensive use, this being done by a small detail from Fort Constitution, just across the harbor from Fort Foster.

"Prior to and during the time in question in this suit it was, and still is, the policy and practice of the military authorities of the United States not to maintain garrisons and train gun crews at all of its coast fortifications, but to maintain garrisons and do such training at fortifications where the facilities for training are best and where there would be less objection and complaint by nearby residents on account of the noise and concussion resulting from practice firing and also to discontinue practice firing at forts where there was or is serious objection and complaint against it. Gun crews for such fortification are given gunnery practice at other forts."

Comment: The first sentence of the finding is inaccurate. It is contradicted by the second sentence of the finding. The fact is that Fort Foster has been continuously kept in service, and that the guns when removed during the War with Germany for the purpose of use in France, were removed with the intention of being replaced as soon as possible with larger guns for the purpose of defending the coast of the United States.

IX.

"The only shots that have at any time been fired from said guns at Fort Foster, and the reasons therefor, and the tangible effects thereof as regards the property of the claimant company, are as follows:

"On or about June 20, 1902, one shot was fired from Gun No. 1 and one shot from Gun No. 2; and on September 26, 1902, one shot was fired from Gun No. 3, which was the easternmost gun of the battery. These shots were fired for the purpose of testing the guns and their carriages and installation generally, and the direction of the

firing was such that the projectiles therefrom passed over and across the western extremity of the land here in suit.

"On November 23, 1914, one shot was fired from gun No. 1, and two shots from gun No. 2; on August 26, 1915, two shots were fired from gun No. 3; and on November 19, 1915, one shot was fired from gun No. 2. These shots were fired for the purpose of testing certain modifications of the gun carriages, made shortly prior thereto. It does not appear that any damage to the buildings or other improvements on the claimant company's land resulted from the concussion from said shots in 1914 and 1915."

Comment: The finding is incomplete in that it omits the material damage resultant on the firing; the physical damage to the realty, and also the material impairment of the freehold, and the destruction of the value of the property were shown by the findings in the Peabody case. The present finding attempts to state the tangible effects of the firing of the guns, but omits any statement of the tangible effects although the last sentence of the finding implies that damage to the buildings had resulted from concussion in 1902.

X.

"In the firing of a 10-inch gun the gases, or blast, from the burning powder charge follows the projectile from the gun for some distance at a great but rapidly diminishing velocity, expanding and covering a gradually widening area along the line of fire."

Comment: This is so indefinite as not to state clearly the facts. The undisputed testimony shows that the blast from a gun extends at an angle of 90 degrees from the point of discharge from the gun at a velocity approximating the speed of the projectile, and with sufficient force to take human life within a distance of 1,200 feet from the point of origin of the blast, either by the direct effect of the blast, or by stones or other loose objects being projected forward by the force of the blast.

XI.

"If the boundary line between Fort Foster Reservation and the claimant company's land from high-water mark down to low-water mark was as illustrated by the line A to I on the accompanying plat hereinbefore referred to, all six of the said shots fired in 1914 and 1915 were fired over and across the westernmost 2 acres of the claimant company's land. One-fourth of an acre of this land was above mean high water and the remainder of it between mean high water and low water, and its entire value was $300. And if said boundary line be as above stated, the quantity of the claimant company's land more or less affected by the blast from the guns in said firing passing over it in the manner indicated by Finding X above, was approximately 8 acres of the westernmost part of it, 3 acres of which was above mean high water and the remainder between high water and low water, and the value of all of which was $2,500.

31 "If, however, the said boundary line between high water and low water ran as illustrated by the line A to F on the accompanying plat hereinbefore referred to, none of the shots fired in 1914 was fired across said land, and the only shots shown to have been fired over said land since the firing of 1902 were the two shots fired from gun No. 3 in August, 1915, the quantity of land so fired over being approximately one-half of an acre. One-half of this land was above high water and the remainder between mean high water and low water, and it was of insignificant value. And if said boundary line be as above stated—that is, on said line A to F—the quantity of the claimant company's land affected by the blast from said firing was approximately 6 acres of the westernmost part of said land, 3 acres of which was above mean high water and the remainder between mean high water and low water, and the value of all of which was $2,400.

"None of the claimant company's said buildings or structures was on the land so fired over or affected by the blast from said guns."

Comment: Obviously unfair to try to trace exact course of each shot over claimants' land and to suppose that only the soil precisely under the projectile was adversely affected. Subject to the same comment as Finding VII, of being in the alternative. The last sentence of the finding is contradicted by the rest of the finding and by Findings V and VI.

XII.

"In the firing of said guns in 1914 and 1915, the officers and agents of the United States especially desired, intended, and took precautions so to fire them, and believed they were so firing them, as to avoid firing any of them over any part of the claimant company's land; and such firing as was done over said land was due to a misunderstanding on the part of said officers and agents as to the boundary lines of said land."

Comment: This is contradicted by Findings X and XI, it being impossible, as shown by the other findings of the Court to fire these guns without firing over the land in question and having the blast from the guns traverse more or less of the land in question. The finding is limited in its language to the land of the claimant company, and the same language is used in Findings XI, IX, VII and VI. This is not in accordance with the findings of the Court in the Peabody case, nor is it in accordance with the evidence. The title in the hands of Samuel Ellery Jennison. The company referred to was a company, of which all of the stock was in the hands of the said Jennison. The finding is irrelevant.

32 XIII.

"In the firing of said guns, notice was first given by the officers of the United States to all near-by residents, including the occupants of the hotel and cottages on the land in suit, the

such firing was to take place, such notice being given in order that they might not be alarmed or frightened by the firing, and also that they might, by the opening of doors and windows, avoid possible damage to property by the concussion from such firing."

Comment: This finding contradicts Finding VIII. It shows acts of dominion over the land in question.

XIV.

"In the manipulation of said guns by the detail charged with keeping them and their carriages in serviceable condition the guns, while not loaded, were pointed in various directions over and across the land of the claimant company, and sometimes in the general direction of buildings thereon, but at no time with any intention of firing them other than when they were, after notice, fired over the westernmost point of said land as in the findings hereinbefore set forth."

Comment: The finding implies that the manipulation of the guns was continuous from time to time. The latter part of the finding amounts to saying that when the guns were pointed they were not pointed with the intention of firing except when they were fired. In the second clause of the finding it is stated that the guns were not loaded. The finding taken literally is self-contradictory.

XV.

"Fort Foster was not constructed for the purpose of firing any of its guns over and across any of the plaintiffs' lands in time of peace, or of so firing them at all, except over the Government's own premises occasionally for testing purposes."

Comment: Not founded on the evidence.

XVI.

"The value of the land and property in suit consists almost entirely in its adaptability and desirability as a summer resort; and frequent firing of said guns of Fort Foster would result in the impairment of said value.

"There are numerous successfully operated summer-resort hotels and properties in the United States situated with reference to various United States coast-defense fortifications and batteries of heavy guns substantially as the claimant company's hotel and property is situated with reference to said Fort Foster and its batteries."

33 Comment: The finding is contrary to the evidence. The weight of the evidence showed that the land was of no value as a summer resort with Fort Foster in service. The weight of the evidence also indicated that the firing of the guns of Fort Foster had resulted in demolishing whatever value the property had had previous to the establishment and maintenance of the Fort. The

second paragraph of the finding is not based on anything in the evidence, and is contrary to fact. There is, as a matter of fact, no place in the United States so situated with reference to any United States coast defense fortification. Whether or not anything similar were found to exist, such evidence would not be legally admissible in this case. No testimony, however, had been admitted into the case of any such situation.

XVII.

"The claimant company was organized by the said Samuel Ellery Jennison for the purpose of taking over from him the land and property here in suit and continuing its operation as a summer resort. Said property had, theretofore, from about 1885, been owned and operated by said Jennison, and he was the principal stockholder of the company and the manager of said company and property after the organization of the company and its taking over of the property in 1902."

XVIII.

"Said hotel and property was operated as a summer resort up to the end of the season of 1904. In 1905 said Jennison, together with other collaterally interested parties, brought suit in this court against the United States, alleging a taking from him by the United States of the property here in suit by the said firing of the guns of Fort Foster over it in 1902. The claimants' petitions were dismissed by the Court (Peabody's Case, 46 C. Cls., 39); and upon appeal to the Supreme Court the decision of this court was affirmed, 231 U. S., 530.

"The operation of said hotel and property during the season of 1902 was financially successful, and during the season of 1903 the hotel and cottages were patronized by a normal number of guests and tenants. The season of 1904 was financially unsuccessful, and the hotel and property was thereafter abandoned by the claimant company as a summer resort, with the exception of the occasional renting of some of the cottages.

"The suspension of the operation of the hotel and property after the year 1904 was due partly to a lack of financial success in its operation during the year 1904, and partly to the advice of counsel for Jennison in his suit against the United States referred to above."

Comment: The last paragraph is not founded on any evidence so far as the suspension of the operation of the hotel being due
34 partly to the advice of counsel is concerned. The finding omits to state what the lack of financial success was caused by. The finding is self-contradictory in that as the suit referred to is stated in the finding to have been started in 1905, the suspension in 1904, even if by advice of counsel, was not by counsel who had at that time acted for Jennison in his suit against the United States. Whether or not the suspension was by advice of counsel throws no light on the facts of the case. The finding is further, indefinite in that it purports to give the cause for the suspension of the project in 1904, but does not as a matter of fact, find that cause.

35 III. *Demurrer to Amended Petition.*

Filed March 23, 1921.

The United States by its Attorney General demurs to the amended petition filed herein for the following reasons.

1. The petition does not state facts sufficient to constitute a cause of action.

2. The petition does not state a cause of action within the jurisdiction of this court.

R. P. STEWART,
Assistant Attorney General.

WM. D. HARRIS,
Attorney.

IV. *Argument and Submission of Demurrer.*

On May 2, 1921, the demurrer was argued and submitted by Messrs. Wm. D. Harris, for the defendant, and Chauncey Hackett, for the plaintiffs.

36 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Sixth day of June, A. D. 1921, judgment was ordered to be entered as follows:

This case coming on to be heard was submitted upon the demurrer of the defendant to the plaintiffs' amended petition and the argument of counsel thereon. On consideration whereof the court is of opinion that the demurrer of the defendant is well taken. It is therefore adjudged and ordered by the court that the said demurrer be and it is sustained, and the plaintiffs' amended petition is dismissed.

By THE COURT.

VI. *Plaintiffs' Application for and Allowance of an Appeal.*

Now come the claimants on this 10th day of June, 1921, by their attorney, Chauncey Hackett, and apply to this Honorable Court praying for the allowance of an appeal according to the statute in such case made and provided, from the judgment rendered herein in favor of the defendant, sustaining defendant's demurrer and dismissing the claimants' petition, to the Supreme Court of the United States, according to law, and hereby give notice of said appeal as herein applied for.

CHAUNCEY HACKETT,
Attorney of Record.

Filed June 10, 1921.

Ordered:

That the above appeal be allowed as prayed for.

June 13, 1921.

By THE COURT.

37 Court of Claims.

No. 34452.

THE PORTSMOUTH HARBOR LAND & HOTEL COMPANY, a Corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, Deceased; S. Ellery Jennison, and Mary M. Jennison

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of demurrer; of the judgment of the court; of the plaintiffs' application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifteenth day of June, A. D., 1921.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,319. Court of Claims. Term No. 364. The Portsmouth Harbor Land and Hotel Company et al., appellants, vs. The United States. Filed June 20th, 1921. File No. 28,319.

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The Supreme Court of the United States.

October Term, 1922—No. 97.

PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, *et als.*, *Appellants*,

vs.

THE UNITED STATES, *Appellee.*

STATEMENT OF FACTS.

The United States has ruined a tract of land on the coast of Maine by setting up a fort containing 10-inch coast defense guns just back of the property of the appellants and firing the guns across the land to sea. (Rec., 2, 3, 4; 9; Pet., ¶ 3-7a, incl.; Ex. C., ¶ 3-10 incl.; 12.)

The land in question is so situated that it forms a natural cover or mask for the battery, and the guns cannot be fired except across this particular land to sea. (Rec., 3; Pet., ¶ 7a; Ex. B; Ex. C. ¶ 3.)

The United States has used the land since 1902 for the purposes of the fort, rendering it useless to the owners. (Rec., 1, 2; Pet., ¶ 3, 4, 5.)

In 1919 the United States used the land further by establishing thereon a fire control station as a part of the fort. (Rec., 2, 3; Pet., ¶ 5, 7, 7a.)

The United States continually dominates the land by pointing over it the guns as if to fire (simulating fire), and occasionally by firing across it. (Rec., 2, 3, 4, 9, 10; Pet., ¶ 6, 7a; Ex. C. ¶ 7, 9, 10.)

In a previous action based solely on the instances of actual firing over the land, it was held that merely firing the guns on three occasions in 1902 was too slender a foundation to establish an intention on the part of the United States to subordinate the land to the right to fire across it whenever the Government might wish to do so, especially as the Government disclaimed any intention to fire in future. (Rec., 2; Pet., ¶ 6. See also opinion, *Peabody v U. S.*, 231 U. S., 530, reprinted in appendix.)

In the view of this court the denial of the United States of an intention to use the land by firing over it at will was held to negative any intention to the contrary in the absence of any firings subsequent to those of 1902. (Rec., 3; Pet. ¶ 6. See also opinion, *Peabody v U. S.*, 231 U. S., 530, reprinted in appendix.)

Hardly was this litigation concluded than the United States again fired the guns, on several occasions. (Rec., 3; Pet., ¶ 6; Rec., 9, Ex. C. ¶ 8, 9.)

A subsequent action based on the theory that these further firings constituted the exercise of an option to take the property by indirect eminent domain was held to show no different case than the first. (Rec., 2. See also opinion *Portsmouth Harbor Co. v U. S.*, 250 U. S., 1, reprinted in appendix.)

Later (and subsequent to the conclusion of the second suit) the firing being renewed, the land also being used for fire control, and the guns being continually pointed and ranged over the land, the claimants having been virtually ousted, and their property utterly ruined filed suit in the Court of Claims for the value of the property, as taken by

the United States; in the alternative the claimants asked for rent for the use and occupation of their property. (Rec., 3, 4, 5; Pet., ¶ 7a, 8, 10, 11.)

Claimants also appealed to the equity side of the Court of Claims for relief appropriate to the situation, seeking a declaration of their equitable rights against the United States in the premises. (Rec., 4, 5; Pet., ¶ 9, 10, 11.)

Claimants also asked equitable relief against certain findings of fact (claimed to be mistaken and physically impossible) which had been made by the Court of Claims and asked to be relieved against the consequences of a premature appeal in the previous suit, which occurred by a mistake which they alleged was not to be attributed to them. (Rec., 4; Pet., ¶ 9.)

The United States demurred generally; the Court of Claims sustained the demurrer and dismissed the petition. From this judgment the claimants appealed to this Court. (Rec., 29.)

3.

SPECIFICATION OF ERRORS.

1.

The Court of Claims erred in not taking cognizance of appellants' claim for rent for the land used for establishing fire control stations.

2.

The Court of Claims erred in not taking cognizance of appellants' claim for rent for the land used by directing the fire of guns thereover.

3.

The Court of Claims erred in not taking cognizance of appellants' claim for rent for the land occupied and used by raising and pointing guns thereover as if to fire across, thereby ousting claimants from the profitable use thereof.

4.

The Court of Claims erred in dismissing the petition without permitting appellants to offer testimony in support thereof.

5.

The Court of Claims erred in sustaining defendant's demurrer to the petition.

6.

The Court of Claims erred in ruling that the facts set forth in the petition did not constitute a cause of action against the United States.

7.

The Court of Claims erred in refusing to allow appellant's claim for the use and employment of the land in question as a mask cover and hiding of the guns and the fort.

8.

The Court of Claims erred in ruling that the firing of the guns coupled with the use of the land as a mask for the fort, and the employment of the land for fire control, and the pre-emption of the use of the land by pointing the guns thereover, the guns being incapable of being fired to sea except over and across the said land, and the land being rendered useless for other purposes by the said use and employment by the United States did not constitute a taking of the use of said land by the United States.

9.

The Court of Claims erred in holding that the facts alleged in the petition did not manifest a design by the United States to subordinate the land between the battery and the sea to the right to fire across it whenever the Government may wish to do so, with the result of depriving the owner of its profitable use within the rule of *Peabody v United States*.

10.

The Court of Claims erred in ruling that it was without

power to correct its findings admitted to be contrary to physical fact, and injurious to claimants; and in ruling that it lacked equitable power to review said prejudicial and erroneous findings not previously called to the attention of the court.

11.

The Court of Claims erred in ruling that the case stated in the petition was without its equitable jurisdiction.

12.

The Court of Claims erred in holding that claimants had no equitable claim for the reformation of the mistaken findings in accord with undisputed fact.

13.

The Court of Claims erred in holding that it had no equitable jurisdiction in the state of facts shown by the petition.

14.

The Court of Claims erred in not holding the petition sufficient as a bill in equity to restrain the United States from further encroachments upon the property and for an account for the use of the property to the date of the petition.

4.

ARGUMENT.

I

A CAUSE OF ACTION PROPERLY PLEADED IS SET FORTH BY THE PETITION.

In regard to form:

We are not aware that there are any formal or special defects in our pleadings but even if there were, it is too late for the United States to urge any such points not raised below. *Gorman v Lenox*, 15 Pet., 115.

Argentine Co. v Terrible Co., 122 U. S., 478.
Keator Lumber Co. v Thompson, 144 U. S., 434.
Wasatch Co. v Crescent Co., 148 U. S., 292.

Besides, such defects are not reached by general demurrer.
Christmas v Russell, 5 Wall., 290.
Tyler v Hand, 48 U. S., 582.

All that is required, by the practice of the Court of Claims is a plain, concise statement of the facts, giving venue and date, free from argumentative, irrelevant and impertinent matter.

Rules of U. S. Court of Claims, 15.

Such a statement, we believe, is presented by the petition and exhibits.

In regard to substance:

(A)

A CASE OF USE AND OCCUPATION IS MADE WITH A CLAIM FOR RENT.

Const. Amendment V.
U. S. v Great Falls Co., 112 U. S., 645; 124 U. S., 581.

This is not like
Hill v U. S., 149 U. S., 593.
where the United States disputed claimants' title, but is assumpsit for use and occupation of another's realty.

Lazarus v Phelps, 152 U. S., 81; 156 U. S., 203.
Carpenter v U. S., 17 Wall., 489.

The sum due is the fair value of the use of the premises having regard to their value at the initiation of the use, plus damages for waste, if any.

Lovett v U. S. (sometimes cited as *Bostwick v U. S.*), 94 U. S., 53.
Johnson v U. S., 4 C. C., 248.
Waters v U. S., 4 C. C., 389.
Pope v U. S., 26 C. C., 11.

The use and occupation stated in the petition was without claim of title, employing the land as a mask cover and hiding of a fort, establishing upon the land fire-control stations, and using it for the purposes of the fort by firing guns across and over it, as well as pointing guns over it in simulation of fire, depriving claimants of the use and profit thereof.

This is certainly a more complete absorption of the realty to the use of the United States than that in

Chappell's Case, 160 U. S., 499.

where a ray of light was directed over the land.

The real value of the property was diverted from the use of the claimants to the use of the United States. What they lose, the United States in protecting the coast for the benefit of all its citizens, gains.

Eaton v R. R. Co., 51 N. H., 504.
Pumpelly v Green Bay Co., 13 Wall., 166.
Chappell v U. S., 34 Fed., 673; same case, 160 U. S., 499.
U. S. v Lynah, 188 U. S., 445.

If it be true that the future may not be certainly deduced from the past and the claimants' recovery be therefore cut down to the actual deprivation of the use of their property which they have thus far suffered, an implied contract to pay a reasonable rent is raised by force of the Fifth Amendment of the Federal Constitution.

> "While the Government does not directly proceed to appropriate the title, yet it takes away the use and

value; when that is done it is of little consequence in whom the fee may be vested."

U. S. v Lynah, 188 U. S., 445.

(B)

A CASE OF TAKING PROPERTY IS MADE WITH A CLAIM FOR COMPENSATION.

Whether the owners are permanently divested of the fee of their property so that the United States is liable for the whole value depends on whether the additional facts of further firing, continually repeated acts of simulation of fire, establishment of fire-control facilities on the claimants' land, the seeking of an option of purchase of a part of the land, together with the failure of the United States to deny its intention to subject the claimants' land to future gun fire, do not raise the presumption of an intention on the part of the United States to impose permanently a servitude on the property.

Const. Amendment V.

Peabody v U. S., 231 U. S., 530. (See Appendix A.)

Or if the above, with the facts stated in the petition are only evidentiary, it must be noted that the petition also definitely alleges such intention on the part of the United States and that this intent is admitted by demurrer. Intention is, in pleading, a present purpose and is pleadable as a fact.

Gelston v Hoyt, 3 Wheat., 246.

The petition specificaliy alleges an intent to fire over the land and a necessity so to fire; and asserts that the guns cannot be fired otherwise; and that the guns of the fort "have hitherto made and do still make impossible the continuous and peaceful use and enjoyment of the said land," etc.

Such a claim has already been held by this court to be a claim of taking.

Peabody v U. S., 231 U. S., 530.

(C)

A CASE OF EQUITABLE RIGHT TO RELIEF AGAINST THE USE OF A RECORD, BASED ON ACCIDENT AND MISTAKE IS STATED.

Story, Equity Jurisprudence, §2043, §2044.
Ibid., §116 et ff.
Currier v Esty, 110 Mass., 543.
Wingate v Haywood, 40 N. H., 437.
Dalton v Lemburth, 9 Nev., 192.

In the present case the petition shows that the attorney making the error acted contrary to the claimants' instructions; that the mistake was not in any way attributable to the claimants or their privies, but was done by heedless inadvertance by an attorney unfamiliar with the case acting during the war as substitute for the attorney of record (who was absent serving in the U. S. Army); and that the defendant would in no way be deprived of any just rights or privileges, or in any way prejudiced, or be hindered in any legal defense by claimant being allowed to show that by reason of the facts alleged this court was deprived of an opportunity to correct the errors manifest in the findings of fact.

The petition sets forth just what were these errors and mistakes (some being in violation of undisputed physical fact) and calls attention to the prejudicial character of the findings complained of.

Such relief is claimed incident to a demand for a money judgment.

U. S. v Jones, 131 U. S., 15.

(D)

A CLAIM OF RIGHT IN EQUITY TO CONDITIONAL INJUNCTION AND ACCOUNT IS MADE.

145, Judicial Code.

This is a claim based on the Constitution Amendment V, and the words "not sounding in tort" do not restrict the jurisdiction of the court.

Dooley v U. S., 182 U. S., 224.

The Court of Claims has no restriction in such case on its power to entertain a claim to be relieved by a finding of equitable right in the claimants to restrain the use of the fort so as not to deprive them of the use of their property, and for an account of damages.

Goodson v Richardson, L. R. 9 Chancery App., 221.
Erhardt v Boaro, 113 U. S., 537.
U. S. v Gear, 3 How., 120.
U. S. v Parrott, 1 McAll., 271.

If this were a suit between individuals a court of equity would restrain the defendant from firing or simulating fire, or otherwise using claimants' land or depriving claimants from the proper use thereof, and would make a decree for an accounting of the sum due from defendant to plaintiff by reason of the past use of claimants' land.

The defendant being the United States, however, the case is not as simple as that. We are faced with certain limitations of the equitable power of the Court of Claims.

We think the Court of Claims mistook these limitations, and mistakenly limited its jurisdiction.

Prior to the Tucker Act, the Court of Claims was without equitable power. It had only powers as of a court of law exercising a special jurisdiction based on the sovereign's consent to be sued in the Court of Claims in certain cases.

U. S. v Gillis, 95 U. S., 407.
U. S. v Alire, 6 Wall., 573.
Bonner v U. S., 9 Wall., 156.
U. S. v Jones, 131 U. S., 15.

Since the Tucker Act

U. S. v Jones, 131 U. S., 15.

the Court of Claims has possessed full equity power wherever the exercise of such is essential and incident to the rendition of a money judgment.

It has often exerted its equitable power in the reformation of contracts.

Indeed, up to the present, it has never refused to exert, in a case calling for equitable relief of any kind the appropriate power; nor has it taken up to now narrow or circumscribed views of its power.

As to the argument that this Court has not exercised its equity jurisdiction in any such case as the present one, it is answered by the fact that no such case has ever come before the Court, and the equity power has not on such occasion hitherto been invoked.

Further, it is clear that the non-exercise of a power is no sort of proof that it is non-existent.

"The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people. Where it is clear the circumstances of the case in hand require an application of those principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts, is no reason for refusing it."

Dodge v Cole, 97 Ill., 338.

"Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

Toledo R. R. Co. v Penna. Co., 54 Fed., 746.

II.

FACTS ALLEGED SHOW THE CASE IS NOT SIMPLY ONE OF TEMPORARY USE BY THE UNITED STATES: BUT CONSTITUTE THE PERMANENT PRE-EMPTION OF ALL TITLE BY THE OPERATION OF INDIRECT EMINENT DOMAIN.

The passage of time and the development of the situation at Gerrish Island has altered the bases on which this court found on the earlier state of facts then existing that a taking had not occurred.

Every consideration recited in Mr. Justice Hughes' opinion in the

Peabody Case, 231 U. S., 530. Appendix A, this brief. as impelling the court to find that a permanent servitude had not then been imposed upon the land has been categorically met and reversed by the facts of the present case.

It was held in the case presented in 1913 that the mere fact that the most suitable field of fire was over claimant's did not support the contention that the servitude was imposed by the establishment of the fort upon adjoining land.

But in the present action it appears that the United States

cannot fire at all except over the claimants; and always whenever firing has fired over the claimants. Consequently the field of fire over claimants is the only field of fire. There is no uncertainty about it!

In the case presented in 1913 it was held that it was not shown that there was any need to fire the guns over claimants.

In the present action such necessity is claimed and proved by all the firing which has occurred since 1913.

In the case presented in 1913 it was held the state of facts then failed to show any intention on the part of the United States to repeat the firings.

In the present case such intention is established by firings in 1914, 1915 and 1920; and by continuous simulation of fire; coupled with negotiations looking to a purchase of part of the property; the establishment of fire control stations on the property; and the deprival of the claimants of their use of the property for a period of years from extending on from 1914 to date.

In 1913 the government denied that it would ever fire the guns again, or that it needed to fire them.

Today, the contrary appears—on this petition it is shown that the government has purposed and does intend to fire the guns and that such firing is required for the proper use of the fort.

Without adverting to the probable restraint which the War Department may have felt in regard to firing these guns during the pendency of actions at law against the United States; and without going into the large question of military efficiency (which is a matter for expert evidence) we confidently submit that the present case presents an aspect upon the bases of reasoning applied in *Peabody v U. S.* directly contrary to the facts from which the conclusions were in that case implied. On each of these claims of fact, admitted by the United States for dialectic pur-

poses by the demurrer, we claim the right to be heard by the Court of Claims, as by a jury, so that the existing facts of the present status may be made to appear.

Assenting to the decision of 1913, which resulted in what was practically equivalent to a non-suit, we think we have shown the entirely different state of facts which has developed since that time and which exists at present.

To decide against this claim of right without hearing the evidence may do claimants great injustice; to send the case down for hearing on the merits to establish the existing facts cannot possibly work any injustice or hardship on the United States.

III.

THE COURT OF CLAIMS HAS UNDOUBTED JURISDICTION IN EQUITY WHERE CLAIMANT'S APPEAL TO THE EQUITY POWER OF THE COURT IS INCIDENT TO A DEMAND FOR MONEY.

Act of Mar. 8, 1887, C. 359, § 1 (Tucker Act), 24 Stat., 505.

U. S. v Jones, 131 U. S., 15.

U. S. v Milliken Imprinting Co., 202 U. S., 168.

In *U. S. v Jones*,* this court said:

> "Claims" redressible "in a court of law equity or admiralty" may be claims for money only or they may be claims for property or specific relief according as the context of the statute may require or allow.

Then having construed the statute and from its context coming to the conculsion that the law contemplated only money decrees and money judgments, the court says:

*Bill in equity to compel U. S. to issue and deliver a patent for timber land alleged to have been taken up and purchased by plaintiff. Defts. demurrer overruled, decree for spec. perf. Decree reversed. Held: No jurisdiction in specific performance against U. S. for issuance of a land patent.

It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands.

In *U. S. v Milliken Imprinting Co.** the court said:

> The government objects at the outset that the Court of Claims has no jurisdiction in equity, and that, although the petitioner's demand is for money under a contract as it should have been drawn, yet in this suit that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action at law but can be granted only in equity.
>
> When relief is granted also on the contract as reformed it means only that the court of equity sees fit to go on and finish the whole case. But we are of the opinion that the court was warranted in taking jurisdiction under a fairly liberal interpretation of the act of March 3, 1887, C. 359, § 1. . . . [After quoting the act.] . . . A claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract, seems to us to fall within these words, in their obvious, literal sense.

In the appeal at bar, the Court of Claims has refused to take the jurisdiction to reform its own findings admitted to be contrary to actual fact. The reformation of these findings in accord with admitted physical fact, easily susceptible of proof, is not an incident to an action at law but can be granted only in equity.

The claim for money upon the contract implied by law, which would be like a right of action at common law but for need of help from equity, falls within the jurisdiction defined by the decisions cited.

---

*Petition for reformation of a contract and damages for breach of same as reformed. Prayer granted with a decree for damages. Decree reversed, on merits. Held: Equity of reformation against U. S. enforceable where there is claim for money on contract as reformed.

Plaintiff alleges that the findings are in the teeth of undisputed physical fact, and that the Court of Claims did not have the usual opportunity to correct the errors which vitally affected plaintiff's claim, because of an improvident and premature appeal taken by the local attorney of record contrary to the instructions and contrary to the interests of the plaintiff. The local attorney of record had come into the case as a substitute in an emergency due to the war. (The Court of Claims filed its findings 25 Feb., 1918. The accident of the premature appeal occurred 28 Feb., 1918. The attorney had come into the case, 8 Dec., 1917.)

We should not complain here if the Court of Claims had on the merits considered this prayer to its equitable power and then held as a fact that the findings were correct; or found as a fact that they were harmless to plaintiffs; but the Court of Claims has ruled that it lacked equitable power to deal with the situation disclosed by the petition.

That situation is, in brief, this: Claimants in 1905 had sued the United States for the value of their property said to be taken by the United States by setting up a fort behind them and firing guns over it to sea. The guns, it was claimed, could not be fired except across the property and the guns had to be fired for practice and other necessary purposes in time of peace as well as in war. The claimant's land was useless with the fort, and the fort was useless without the claimant's land. The United States acquired by dominating the property and making it useless to the owner all the real value and use of it.

When the case stated reached the Supreme Court in 1913, this court while accepting the claimant's proposition of law held that on the findings of fact made below it was not clear that the government had to fire the guns or that they would ever be fired in future; and that it was not clear even if they were to be fired that they had to be fired over claimant's

land. The guns had not been fired since 1902 and the government had denied an intention to fire them in future. (This denial was in the form of a traverse to the petition.)

This court held the facts recited constituted too slender a foundation on which to predicate a taking of the property.

Hardly had this decision been made when the government, contrary to its denial of an intention to fire the guns, fired them repeatedly over the claimant's property, and continually raised and pointed them as if to fire.

Claimants at once brought suit anew; and although the undisputed evidence, and indeed the topography of the *locus in quo* made it obvious that it was physically impossible to fire the guns except over the claimant's land, the Court of Claims found as a fact that the fort

> "was not constructed for the purpose of firing any of its guns over and across any of the plaintiffs' lands in time of peace or if so firing them at all, except over the government's own premises occasionally for testing purposes."

(There were other findings of which claimant's complaints are not waived. See record, Ex. A, Ex. E.)

It is the invariable practice in the Court of Claims to hear applications for revision of the findings as on motion for a new trial.

The accident of the unexpected appeal, which simply could not have been foreseen or guarded against by claimants, foreclosed the possibility of correcting these findings. The record sent up on appeal was superficially consistent and complete, whatever were the wrongs and errors latent in it. A finding of fact by the Court of Claims puts the parties to an appeal to this court into a kind of legal straight-jacket, and unless there is patent error or ambiguity there can be no relaxation of the binding force of the presumption of the truth and completeness of the findings. A motion to remand

was denied here, there being, of course, nothing on the record to sustain it.

Upon the findings this court held that there was nothing to distinguish the facts from the original case, and on the record then presented that was so. The vital question on which claimants lost was whether the government was subordinating the claimant's land to the right to fire over it whenever it saw fit, without which right the battery would be useless. As the court below had found non-intention to fire over the claimant's land based on the theory that the government could fire over its own land whereas it is a physical and mathematically demonstrable impossibility for the government to do so, the facts of non-intention plus the repeated denial of any intention to fire in future, were in themselves, even had they not been coupled with other prejudicial matter in the findings, enough to cost claimants their case.

When the second case terminated we were at war. Subsequent to the cessation of hostilities on Nov. 11, 1918, the United States, in continuance of a necessary and proper maintenance of its coast defenses (but in effectual disproof, if that were needed, of the traverses interposed to the claimant's petitions) fired the guns again, manipulated them continually, invaded the claimant's land to construct fire control stations, and generally assumed to subordinate the land to the purposes of the fort. An option of purchase of part of the property was obtained but lapsed.

Claimants, considering the purpose of the United States now shown beyond a doubt, brought suit alleging the novel actions, as well as the old, of the government: and in order to embrace every cause of action to which they might be entitled at law included as in a separate count a claim for rent for the past use and occupation of their land. In order to avoid the prejudice of the findings which had been made

contrary to undisputed evidence or physical fact, or both, claimants prayed that the Court of Claims review and reform these findings on the ground of mistake, and accident.

But the Court of Claims in sustaining the demurrer ruled itself to be powerless to correct the wrong which had been done and to cut the tangle which had resulted. It ruled that it had not equitable power in the premises, although the petition showed that the interposition of equitable power was sought only in aid of a money judgment.

This, we submit, in view of the cases cited was error.

IV.

THE COURT OF CLAIMS HAS GENERAL EQUITY POWERS LIMITED ONLY BY THE NATURE OF THE SOVEREIGNTY OF THE UNITED STATES AND BY THE DOCTRINE ADUMBRATED BY THE DICTA IN THE OPINION OF THIS COURT IN *U. S. v JONES*, 131 U. S., 15.

THE INSTANT CASE DOES NOT COME WITHIN EITHER LIMITATION.

Assuming that the claimants have no adequate remedy against the United States at law, because by the peculiar circumstances of the case the purpose of the government so far as it hinges on the degree of activity of the guns, has become only slowly apparent; and assuming further that not yet has the degree of use of the fort, though inhibiting the full use and enjoyment by the claimants of their rights in their own property, shown a ripened intention on the part of the United States to take the entire dominion of the property so as to vest title in the United States; the following questions arise, all of which, we believe, should be answered in the affirmative, for the reasons stated.

(A)

Have the claimants a right in equity to have the firing stopped, regulated or continued upon terms, and to an account of the sum due them in compensation for the partial use up to date, together with the damages caused by said use?

Certainly, if the firing be not a military necessity it has no justification and it could, in theory, be stopped by a continuous series of suits against the successive commanding officers of the fort.

On the other hand, if the firing be a military necessity involving firing from time to time and this fact can be established only by several actions, the land owners are put to a series of suits.

In either alternative, equity takes jurisdiction under the well known principle under which it entertains a bill of peace to avoid a multiplicity of suits.

1 Pomeroy Equity Jurisprudence, 3rd Ed., 243 *et seq.*
Hale v Allinson, 188 U. S., 72.
Demarest v Hardham, 34 N. J. Eq., 469.

The nature of the incidents of maintaining a battery of guns, and the continuing violation or usurpation of the property rights of an adjoining proprietor who is made a target or fired over, brings such a case squarely within the doctrine of those cases in which equity grants injunctive relief against a continuous wrong.

It is obvious that as between private owners equity would take jurisdiction to enjoin such an outrageous violation of an adjoining proprietor's rights as firing and pointing guns over him from a permanent installation of ten-inch guns. (Incidentally, it would hardly be a defense that the firing, though always threatened, did not actually take place very frequently.)

In such case, equity would take jurisdiction to give relief against a continuous trespass, causing irreparable damage, for which adequate relief was unattainable in a bare action at law.

What principle, if any, distinguishes the case where the Federal government is defendant?

The only two difficulties which may be urged where the Federal government is defendant are, in our opinion, easily overcome.

The first is that to take jurisdiction in such case as the present will make the judicial not the executive branch of the government decide what is a military necessity, and that it would amount to a judicial usurpation of an executive function.

Our answer to this objection is that the executive in answering the claim would retain completely the function of deciding the military necessity. If the executive regard the fort as absolutely useless, there is no usurpation of any rights in the court holding that it ought to be abated, and its guns not used there in future. If the executive in answering determine that there is no military necessity for firing the guns in peace there can be no usurpation by a determination by the court that claimants have an equitable, if not a legal right, not to have them fired in future in time of peace, coupled with a determination of the just compensation for the interruption of their use of their property in the past. If on the other hand the executive in answering determine that military exigency requires the maintenance of the fort with the guns fixed so as to fire over claimants' property whenever the government sees fit, the court usurps no executive prerogative by finding that the guns should not be fired by reason of the military exigency except upon the government contracting to pay by way of rent, or by condemnation the just compensation required by the Constitution.

So that in any case the court is not encroaching upon the executive power.

Further, if the executive vary its decision, a court of equity is always open to an application to amend its order in accord with an altered situation.

The second difficulty which may be urged is that Equity acts *in personam,* and that no decree can be made against the United States: that if made, it could not be enforced as the decree could only be enforced by the defendant upon itself, which involves absurdity.

We answer to this that no such situation can possibly arise, as there would be no decree in the ordinary sense disobedience of which would be a contempt. The determination of the court would be merely a conclusion of law, that claimants had, in the state of facts found, a right in equity to have such and such relief. No decree would be made except such as would in form be assimilable to the judgments at law of the Court of Claims.

That court cannot, and never has attempted to render judgments or decrees against the United States, as an ordinary court of law against a defendant. The judgments, so-called, of the Court of Claims are merely findings that a certain sum is due to a claimant. No process can be used to enforce the payment. It is in reality nothing but a report to Congress that an account has been found due and ought to be paid. Judicial Code, Sec. 148, 151, 187. There is only a moral suasion in it. Congress is under no compulsion of any legal nature.

Precisely the same quality would inhere in a finding that there is a right in equity against the United States.

Exactly this quality inheres in the decisions of the Court of Claims reforming contracts to which the United States is party: this sort of equity has been often declared by the Court of Claims. It is given effect by acceptance based on

a moral sway, not by a decree refusal to recognize which constitutes contempt.

We believe that the conclusion is justified, that, on the conditions assumed, the claimants have a right in equity which the Court of Claims can find, to have the firing stopped, regulated or continued upon terms coupled with an acounting of the amount due by way of compensation for the partial use of the property up to date, together with the damages caused by such use.

(B)

The next question is if claimants have a right and that right has been violated, do the laws of their country afford them a remedy?

> "The very essense of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.
>
> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."
>
> *Marbury v Madison*, 1 Cr., 163.

These familiar words are quoted to show how this court naturally approaches the construction of such provisions as:

> "nor shall private property be taken for the public use without just compensation"

and such remedial legislation as the Tucker Act, now Sec. 145 of the Judicial Code:

> "The Court of Claims **shall have jurisdiction** to hear and determine the following matters:
>
> "First. **All claims** (except for pensions) **founded upon the Constitution** of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, **in respect of which claims the party would be entitled to redress** against the United States either **in a court of** law, **equity,** or admiralty **if the United States were suable:**"

With great emphasis, *Marbury v Madison* pronounces the dogma that the primary object of constitutional and statute provisions, as well as the primary function of courts is to give to the individual protection in his rights whenever he receives an injury.

It is in the light of this concept that we seek to apply the doctrine defined in *U. S. v Jones* that the assertion of equities against the United States not incident to a demand for money were not within the scope of the language conferring equity jurisdiction upon the Court of Claims.

Taken in the light of this concept, all presumptions favor the fullest protection of the individual in his rights against the United States, whether they be legal vested rights, or equitable rights incident to the demand for money, as in the aspect now under consideration of the present case.

The sovereign character of the defendant does not prevent such protection of the individual; and, as already stated, no technical difficulty regarding process or contempt can arise, if the ordinary procedure of the Court of Claims is followed. Its finding, then, is simply persuasive and declaratory of the claimants' right, but not a decree founded on the sovereign power, directed to the sovereign power, for violation of which the sovereign power would commit the sovereign power to the keeping of the sovereign power!

(C)

Then, if the laws do afford the claimants a remedy, is it what they have asked, namely: the finding by the Court of Claims of a conclusion of law founded on the claimants' right to peaceful use and enjoyment of their own property, and the injury consequent upon its whole or part use by the United States (or of the continuing trespass by the United States) declaring that the firing ought to be restrained, stopped or continued on terms, coupled with an accounting for use, occupation and damages to date?

We believe, if there be no adequate remedy at law, that this is the only proper and effective remedy, such as it is.

It is the remedy analogous to that given by a court of equity as between private persons.

It is the remedy contemplated by the statute conferring jurisdiction in all claims

> "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

It is the remedy to which Congress has consented by the above language. And if the consent of Congress be erroneously implied, Congress still holds the power to rectify the situation in general or in a particular case.

DeGroot v U. S., 72 U. S., 419.

The only way in which to carry out the will of Congress which sought to translate into action the words of Chief Justice Marshall on the first duties of government is by this specific relief.

If any recourse to the equity power of the court be useless because of a supposed defect in the remedy sought, the powerful words of the Constitution, and of the opinion in *Marbury v Madison*, together with the fair-seeming im-

plication of equitable aid given by the statute, become to claimants a mere façade, impressive to look upon, but with nothing behind it.

But we think the ratio of *U. S. v Jones* is simply that specific performance for the issuance of land patents will not be decreed, while by way of dicta the doctrine is defined that claims based on equitable rights will not be entertained nor equitable relief granted, except on cases where such claim or relief is involved incidentally to the rendition of a money judgment.

The present case, in its equitable aspect, is one in which a money demand is pursued.

It can hardly be said, therefore, that we are pursuing a claim for exclusively equitable relief not incident to a money demand.

Hence the doctrine of *U. S. v Jones* does not leave us outside the equity jurisdiction defined in that case.

5.

CHRONOLOGY.

1873, May. United States purchased land fronting on Piscataqua River for construction of a river battery planned to form part of defense for Portsmouth Harbor.

1876. Project abandoned.

1885. Development of Pocahontas Point and surrounding land for summer hotel and cottage purposes begun.

1901, June 30. The United States used the site of the abandoned river battery for the establishment of a coast defense battery, the front line of the coast defense battery being slued around so as to fire to open sea over the claimants' land.

1902. Pocahontas Point development having reached a prosperous condition, is deprived of all value and ruined by

the establishment of the Fort and the firing of ten-inch guns across the property.

1905. Claimants bring suit in the Court of Claims, alleging a taking by the United States of the property by the firing of the guns of Fort Foster in 1902.

1905-1913. War Department during pendency of suit refrains from firing guns. A small garrison cared for the guns, occasionally manipulating them and raising them so as to point across claimants' land.

Dec. ~~1914.~~ Supreme Court of the United States decides that land has not been taken by the United States, on the ground that while the continual firing of the guns across the land of the claimant would constitute a taking, that as the firing had only occurred on two separate occasions in the year 1902, the property had not been taken by the United States.

1914, Nov. 23. War Department resumes firing of guns.

1915, June 11. Claimants start new suit in the Court of Claims based on the alleged taking of the property by the firing of the guns in 1914.

1915, Aug. 26. Guns fired.

1915, Nov. 19. One shot fired.

1917, April 6. United States enters the war against Germany. During early part of war guns demounted to be sent to France, but were not sent.

1918, Nov. Hostilities ceased.

1919, May 19. Supreme Court decides against claimants on ground that guns have not been shot frequently enough to constitute a taking under the rule of law established in the first case.

1919. United States having remounted the guns in same position, and on same carriages, offers to purchase part of claimants' land.

Fire-control stations established on claimants' land.

Hotel razed.

1920, Feb. 10. Claimants start present action.

1920, December. Guns fired again across claimants' land.

1921, March. United States demurs to the amended petition.

1921, June. Court of Claims sustains demurrer.

6

CONCLUSIONS.

(A summary of appellants' theses, not inclusive of points made in support hereof.)

USE AND OCCUPATION.

1. The United States having reduced our land to a mere adjunct of the fort and having used our land to the exclusion of the owners from the use and profit thereof is liable in assumpsit to pay rent for the use and occupation; and such rent is claimed by the petition.

2. The sum due is the fair rental value of the land as of the time of the initiation of the use, plus damages in the nature of waste as claimed by the petition.

3. Claimants assert a claim for rent for the past use and occupation which constitutes a cause of action against the United States, even were the fort to be abandoned tomorrow.

4. If the use and occupation be temporary or transitory the proper remedy is assumpsit on the implied contract, and this the claimant has sought in the instant action.

TAKING OF FEE.

5. On demurrer the fee to the claimants' land must be regarded as having been taken by the United States, its intention to use the fort by firing over the claimants' land whenever it sees fit having been alleged by claimants, and the United States having admitted by demurring its intention so to do.

6. In the Peabody case it was held that findings which did not clearly state that there was a necessity that the guns be fired over the claimants' land were in the face of governmental denial, too slender a base on which to predicate a taking of the land in question: in the instant case the United States admits by its demurrer that

> "It was needful to the United States in the use of said fort to fire the guns thereof across the claimants' land at any and all times in time of peace and at all times for practice to fire the guns across said land and through the column of air superincumbent thereon; and it was needful for the proper efficiency of said guns that the said guns be kept in readiness for accurate use by the United States and that they be used for practice from time to time continuously,"

and the United States also admits that they

> "have set up the guns with the intention of firing and pointing them as aforesaid over and across the said land . . . and without intending or being able to fire the said guns to sea except over and across the said land."

Consequently the demurrer must be taken as a matter of law to admit facts sufficiently under the rule of the Peabody Case to establish a taking of the fee by the United States.

EQUITY: REFORMATION.

7. A proper case for the exercise of equity occurs when a law court by mistake adopts findings (such as a special verdict) contrary to fact or stating as fact a thing contrary to physical possibility, and by accident is prevented from an opportunity to correct such findings, where such record prejudices a party and may be used against him in future to his prejudice.

8. The Court of Claims has plenary equity power of reformation, review and correction where the equitable power is invoked incident to the demand for a money judgment.

EQUITY: RIGHT TO ACCOUNTING AND DETERMINATION OF COMPLAINANTS' ABSTRACT RIGHT TO USE LAND WITHOUT SERVITUDE.

9. As between individuals the maintenance of ten-inch guns on adjoining land, said guns not being capable of being fired elsewhere, accompanied by pointing and firing them over complainants would give right to a decree to restrain further use of complainants' land and for an accounting.

10. The Court of Claims has plenary power to determine the rights in equity of the complainant for the purpose of fixing the measure of damages to be paid by the defendant, which is dependent upon the circumstances of whether the United States will abandon or continue the fort: such determination of the equity of the complainants being a conclusion of law and not a decree binding the United States, but holding a moral sanction equivalent and analogous to the ordinary money judgment of the Court of Claims; such conclusion being incident to the rendition of a money judgment.

Respectfully submitted,

CHAUNCEY HACKETT,
Attorney for Appellants.

APPENDIX A.

SUPREME COURT OF THE UNITED STATES.

Appeal from the Court of Claims.
No. 289.—October Term, 1913.

MARY R. PEABODY, SACO AND BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, APPELLANTS,

v

THE UNITED STATES.

(December 15, 1913.)

Mr. Justice Hughes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing petitions for compensation for land alleged to have been taken by the United States for public use. 46 C. Cls., 39. Separate suits were brought by Samuel Ellery Jennison, the owner at the time the taking is said to have occurred, by his mortgagees, Mary R. Peabody and the Saco and Biddeford Savings Institution, and by his grantee, the Portsmouth Harbor Land & Hotel Company. These suits were consolidated and the merits were heard. The following facts are shown by the findings:

The land in question, comprising about two hundred acres, forms the southern corner of Gerrish Island, the southernmost point on the coast of Maine. It lies about three miles from Portsmouth, bordering on the south and east the Atlantic Ocean and on the west the entrance to Portsmouth Harbor. Its value consists almost entirely in its adaptability for use as a summer resort and it had been improved for this purpose by the erection of a hotel, cottages, outbuildings and pier, by the construction of roads, and by the provision of facilities for summer recreations.

In 1873, long before Jennison acquired title and improved the property, the United States began the construction of a twelve-gun battery upon a tract of seventy acres lying north and west of the land in suit and abutting upon it. This battery was to be one of the outer line of defenses of Portsmouth Harbor, for which appropriation had been made by the Act of February 21, 1873, C. 175, 17 Stat., 468. (See also Act of April 3, 1874, C. 74, 18 Stat., 25.) By the year 1876, a large sum had been expended upon the work which had reached an advanced stage of construction. Operations were closed in September of that year, however, for want of funds and the fortification was not occupied by the United States thereafter until work was resumed in 1898. The Government then constructed on the same site a battery consisting of three ten-inch guns and two three-inch rapid fire guns. It was practically completed on June 30, 1901, and was transferred to the artillery on December 16, 1901, being named Fort Foster.

No part of the fort encroaches upon the land in suit; the fort is within two hundred feet of its northwestern corner and about one thousand feet from the hotel. The claimants' land lies between the fort and the open sea to the south and southeast; and the guns have a range of fire over all the sea-front of the property. As the government reservation on its western side borders the entrance to the harbor, the court found that there was an available portion of the shore belonging to the reservation which permitted the firing of the guns in a southwesterly direction "for practice and for all other necessary purposes in time of peace" without the projectiles passing over the land in question. This conclusion was reached by applying the local law governing the boundary lines of contiguous proprietors where there is a curvature of the shore. *Emerson v Taylor,* 9 Me., 42. It may be noticed here that the petitioners insist that the guns

could not be fired over the narrow area thus found to be a part of the reservation without endangering life and property along the New Hampshire coast and they present in their brief a map to support their assertion. The Government urges that this map has not been identified and is wholly incompetent; and that, as the question is one of fact, the finding must be deemed conclusive. But while thus finding that there was a line of fire available to the Government over its own shore property, the court also found that the most suitable field of fire for practice and other purposes in time of peace would be over the claimants' land.

On or about June 22, 1902, two of the guns were fired for the purpose of testing them at a target off the coast, the missiles passing over the land in suit; and another gun was fired for the same purpose and to the same effect on September 25, 1902, the resulting damage to buildings and property amounting to $150.

None of the guns has been fired since, but they have been kept in good condition by a detail from Fort Constitution which is situated across the Piscataqua River. The court below further states in its finding that "it does not appear from the evidence that there is any intention on the part of the Government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions as hereinbefore found."

In the years 1903 and 1904, the hotel which had previously been profitable was conducted at a loss; since 1904, it has been closed and the cottages have been rented only

in part and at reduced rates. It is found that the erection of the fort and the installation of the guns have materially impaired the value of the property and that this impairment will continue so long as the fort and artillery are maintained. This is found to be due to the apprehension that the guns will be fired over the property.

The question is whether upon this showing the petitioners were entitled to recover.

It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a "taking" within the principle of the decisions (*Pumpelly v Green Bay Co.*, 13 Wall., 166, 177, 178; *United States v Lynah*, 188 U. S., 445, 469; *United States v Welch*, 217 U. S., 333, 339) and not merely a consequential damage incident to a public undertaking which must be borne without any right to compensation (*Transportation Co. v Chicago*, 99 U. S., 635, 642; *Gibson v United States*, 166 U. S., 269; *Scranton v Wheeler*, 179 U. S., 141, 164; *Bedford v United States*, 192 U. S., 217, 224; *Jackson v United States*, 230 U. S., 1, 23).

But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether enough is shown to establish an intention on the part of the Government to impose it. The suit must rest upon contract, as the Government has not consented to be sued for torts even though committed by its officers in the

discharge of their official duties (*Gibbons v United States,* 8 Wall., 269, 275; *Langford v United States,* 101 U. S., 341, 343; *Schillinger v United States,* 155 U. S., 163, 169; *Russell v United States,* 182 U. S., 516, 530; *Harley v United States,* 198 U. S., 229, 234); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property (*United States v Great Falls Mfg. Co.,* 112 U. S., 645, 656, 657).

The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the government merely because it is suitable to be used in connection with an adjoining tract which the government has acquired, or because of a depreciation in its value due to the apprehension of such use. The mere location of a battery certainly is not an appropriation of the property within the range of its guns.

The petitioners' argument assumes that the guns, for proper practice must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the government's portion of the shore in which it is said that this would be sufficient " for the purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the

suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the government has taken property, which it denies it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon the two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

The judgment is affirmed.

Affirmed.

APPENDIX B.
SUPREME COURT OF THE UNITED STATES.

Appeal From the Court of Claims.

No. 381—October Term, 1918.

PORTSMOUTH HARBOR LAND & HOTEL COMPANY, ET AL.
v
THE UNITED STATES.

(May 19, 1919.)

MEMORANDUM OPINION BY THE CHIEF JUSTICE.

Recovery was sought in the court below from the United States for property taken by it as the result of the alleged firing of guns in a fortification on the coast of Maine and the passing of the projectiles over and across a portion of the land alleged to have been taken. The court finding that a former case by it decided against the owners and here affirmed (*Peabody v United States*, 231 U. S., 530), for taking of the same land resulting from instances of gun fire resulting from the same fort and guns, was identical with this, except for some occasional subsequent acts of gun fire, held that case to be conclusive of this and rejected the claim on the merits.

Coming to consider this action of the court in the light of the findings by it made, we are constrained to the conclusion that it was right and that no possible difference exists between this and the *Peabody Case*. Before applying this conclusion we say that we find that the record discloses no ground for the applications here made to remand and for additional findings.

Judgment affirmed.

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AUTHORITIES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY et al., appellants,
v.
THE UNITED STATES.
No. 97.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT.

This is the third of a series of suits brought by the Portsmouth Harbor Land and Hotel Company and other claimants against the United States arising out of the firing of guns from the same fortification. The two previous suits were decided in favor of the Government. (*Peabody* v. *United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. et al.* v. *United States*, 250 U. S. 1.)

Between 1898 and 1901 the Government constructed a battery upon a site which it had commenced to fortify 25 years before. This battery is upon land which is in the main separated from the ocean by property which is now owned by the appellants.

In 1902 three of the guns were fired over land to which the appellants claimed title. They brought action in 1905 upon the ground that by such firing the Government had "taken" their property. The suit was tried in the Court of Claims in the latter part of 1910, and was decided in favor of the Government. The decision was affirmed by the Supreme Court in December, 1913, in an opinion by Mr. Justice Hughes. (*Peabody* v. *United States*, 231 U. S. 530.)

Eighteen months later the appellants again sought recovery, alleging a few subsequent acts of gunfire, but the Court of Claims held that there was no possible difference between the second case and the first case and rejected the claim. (53 Ct. Clms. 210.) This court affirmed the judgment of the Court of Claims. (250 U. S. 1.)

Nine months later the appellants instituted the present (third) suit, alleging the identical acts of gunfire which had been considered by this court in the earlier actions, and alleging further that on the 8th day of December, 1920, the Government had discharged guns over their property, that on other occasions guns had been pointed over their land, and that the Government had established a fire-control station and service on the land.

The claimants asked judgment for rent for the use of the land during all of the period since the firing involved in the first case, except in so far as the statute of limitations interposed a bar, and for the value of the property taken: or, if the United States

should abandon the fort, for the amount of rental plus damages for impairment of the value of the land, saying in paragraph 11 that the value of the property at the date of the disestablishment of the fort should be deducted from this sum, and in paragraph 12 claiming the sum without deduction.

The petitioners also in this third suit invoked the equitable jurisdiction of the Court of Claims for the correction of alleged erroneous findings of fact in the second of this series of suits.

On demurrer the petition was dismissed. The claimants thereupon brought this appeal.

ARGUMENT.

I.

ESSENTIAL QUESTION INVOLVED.

The essential question is whether the firing of guns over the land of the claimants in December, 1920, and the establishment of a fire-control station on a relatively small portion of the land, constitutes a taking or continuous using of the entire land of the claimants.

The firing of guns in December, 1920, did not constitute a taking of the land.

The appellants show firing of the guns upon only one occasion since November, 1915. Upon that single occasion, so far as appears, each of the coast-defense guns was fired once. The firing was in midwinter, over land which, according to the appellants, is of little or no value except for purposes of summer residence (R. 9, 10), and the firing occurred after the

hotel had been razed. (Appellants' brief, p. 27.) It is not alleged that the Government had razed the hotel.

The decision of this court in *Peabody* v. *United States* (231 U. S. 530), followed in *Portsmouth Harbor Land & Hotel Co.* v. *United States* (250 U. S. 1), supports the position taken by the Government that such firing did not constitute a taking of the land. In this connection the court is asked to consider, not possible interpretations of the pleadings of the parties, to which the appellants' brief refers, nor an erroneous syllabus, but the reasons which were given by the court itself for its decision.

The court in the first decision pointed out that guns had been fired over the land of the claimants and then demonstrated the unsoundness of the contention of the claimants that because guns had been placed in position and some firing had been done much more firing over their land was to be expected. (See pp. 537, 538, 540.)

Thus the court called attention to the finding by the court below that an intention of the Government to fire its guns over their land in time of peace had not been shown

> "excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions as hereinbefore found." (Pp. 537, 538.)

The Supreme Court then pointed out that the appellants had assumed that practice firing over

their land was necessary, but replied that the facts of the case showed that this was not true. It added (p. 540):

> That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

But the portion of the opinion which is most helpful in solving the case now before the court must be found not in the passages in which the court pointed out that the claimants had shown nothing from which future firing over their land in time of peace could be anticipated, but rather in the following sentence (p. 538):

> It may be assumed that *if* the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.

Judged by this test, the firing in 1920 did not constitute any appropriation of the appellants' property.

Five years had elapsed since the last previous firing and then on this midwinter day, when the ground was unoccupied and the summer hotel had been razed, guns were discharged on one occasion and one occasion only over a deserted tract of land. Certainly this isolated instance of firing did not deprive the claimants of the "profitable use" of their land.

The first firing from the fort was done in June, 1902, and was over an existing summer resort; and most of the other previous instances of firing were in summer time. Then, if ever, occurred the injury to the summer resort. And yet this court has already decided unanimously in two cases that the Government had not thereby taken the land of the claimants. The only firing which the court has not already passed upon is the firing involved in the present suit, and in this case it appears most clearly from the record that the one instance of firing in question in December, 1920, could not have interfered with the use of the land for the purposes to which it was adapted.

Moreover this isolated instance of firing did not justify the possible assumption, referred to as a possible premise by this court in its opinion in the first case, viz, that the Government intended to discharge guns over the land of the appellants for practice or otherwise "whenever it saw fit."

The petition shows that the guns were dismounted after the United States entered the World War, apparently for the purpose of sending them to France (R. 3), and that after the Armistice, between February, 1920, and March, 1921, the United States set up coast-defense guns in the fort and discharged those guns in December, 1920. (R. 3, 4.) There is nothing in the petition to negative the natural inference from these facts that the World War caused such a disarrangement of the guns or their mountings that after new guns had been installed or old guns reinstalled it was necessary to make one firing from each gun to ascertain whether the complicated mechanisms of the guns and their mountings had been placed in good working order. The Government did not discharge the guns until midwinter, when the discharge could not occasion any possible inconvenience to the appellants. Under the circumstances it can not be said that the Government showed any intention to fire over the land "whenever it saw fit." On the contrary, the entire absence of gun firing during the summer season during these five years seems to indicate that the War Department did not wish to injure the appellants' property.

The pointing of unloaded guns over the land of the appellants did not constitute any taking or using of those lands.

Such a pointing of the guns did not even create any reasonable fear that they would be discharged. It is true that if a man lifts a gun to his shoulder and

points it toward another man in a threatening manner, thereby putting the other man in fear, a tort is committed. But the pointing of the guns of this fort did not involve a threat nor did they cause any reasonable apprehension that they would be discharged. Guns are often mounted for defensive purposes for use in the remote event of a war. Between November, 1915, and the filing of the amended petition in March, 1921, while the guns were pointed frequently, they were fired upon only one occasion, and then under such circumstances that the appellants could not have been materially disturbed thereby. The attendant circumstances must have led anyone who was acquainted with them to realize that the movements of the guns were not preludes to their discharge and that the guns would not be discharged inconsiderately.

And there are other considerations which would have led to the same conclusion.

The discharge of a coast-defense gun involves a large expenditure of money. The interests of the Government demand that it should not be done unnecessarily; and, except under very unusual circumstances, their discharge would be not only expensive but inexcusably so.

As everyone must know, the duty of the man who handles such a gun is not to aim at a target seen by himself but to point the gun at the precise angles determined for him by a man who in turn may not see either the target or the gun when he gives the

orders. The duty of the man at the gun is to point it accurately and promptly in accordance with orders. He can be trained to do such work without the discharge of a single shell, and this work can be thoroughly appraised without the expenditure of a single cent for gunpowder.

It has not been shown that it is necessary to test the guns at the fort to which they are assigned or to practice firing at that fort. In *Peabody* v. *United States* (231 U. S. 530, 539, 540) this court said:

> The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the Government's portion of the shore in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910, and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occa-

> sions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. *It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the Government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.*

Gunners are given experience in the actual discharge of projectiles at fortifications where the facilities for training are best and where there is least objection and complaint by near-by residents on account of the noise and concussion resulting from practice firing, and *they are not given practice firing at forts where there would be serious objection and complaint against it.* (Record, p. 24, Finding of Court of Claims in second case.)

The appellants may not have read what this court said concerning practice firing in the first of these cases. They may not have read what the Court of Claims said about it in the second case. But after they had observed that guns which were pointed over their land on numerous occasions were discharged on only one occasion after November, 1915, five years later, in fact, and that this firing was in midwinter over a deserted tract of land, they should not have thought that the mere pointing of the guns indicated that they would be discharged inconsiderately.

The United States has not made any admission inconsistent with this position.

It is true that the petition alleges that the United States has set up the guns with the intention of firing and pointing them across the land of the claimants, but this allegation does not show that pointing of the guns should arouse any apprehension that they will be fired when pointed.

The appellants' brief (p. 29) also quotes the following passage as contained in their petition and admitted by the demurrer:

> It was needful to the United States in the use of said fort to fire the guns thereof across the claimants' land at any and all times in time of peace and at all times for practice to fire the guns across said land and through the column of air superincumbent thereon; and it was needful for the proper efficiency of said guns that the said guns be kept in readiness for accurate use by the United States and that they be used for practice from time to time continuously.

But that statement was made in the petition in the appellants' second suit, which was brought in 1915 and decided in favor of the Government in 1919 (250 U. S. 1). It was not made in the petition in the present case unless brought in by reference where it is said that the petition in the former suit is—

> requested to be taken as if incorporated herein at this point, and all the material facts and descriptions therein contained are hereby reaffirmed and stated by your petitioners. (R. 2, 3.)

It is submitted that the statement made in the brief for appellants was not made in their present petition in the sense in which they now quote it.

The cross-reference to the second suit was made in the petition in the present (third) suit when that petition was originally filed in February, 1920. At that time the petitioners did not cite a single instance of firing after November, 1915. In March, 1921, they amended their petition. In this amendment they say that the guns have been raised and pointed at frequent intervals, but the only allegation as to the actual firing of guns related to the firing on December 8, 1920, separated from the firing of 1915 by an interval of five years. Therefore, it seems that the paragraph as to practice firing quoted from page 29 of the appellants' brief, expressed in the past tense, and expressed in the past tense in the petition filed in the second case, must refer to conditions considered by the court in the second case, and must be alleged in connection with the contention of the appellants that while this court had twice decided that the United States had not taken the lands, the Government nevertheless had used the lands and but for the statute of limitations would owe rent for the use of that land back to the year 1902.

The statement as to practice firing which is quoted in the brief can not be regarded as relating to the period since November, 1915. Otherwise, it is not in accordance with the facts.

The establishment of a fire-control station and service does not justify a recovery in the present case.

The appellants' petition shows that such a station and service were established, but it does not show of what they consisted. For all that appears in the record, it is possible that all that was done was that men went upon the appellants' land on a couple of occasions and from that vantage point gave directions to the gunners. Such a using of a few square feet of deserted land for a few minutes might be a trespass, but it would not constitute a taking of the land.

The petition does show that in 1919 the Government offered to purchase a portion of the land; but it does not show that the offer was accepted, and it does not show that the United States attempted to make permanent use of the portion which it had offered to buy. Moreover, even if the United States has attempted to make permanent use of a portion of the land, which is nowhere alleged, it certainly does not follow that the Government was obliged to pay for the entire land of the appellants; and the appellants have not limited their claim to the small portion of the land which would be involved.

The contention that the Government is liable for its use of the fort during the period covered by the decisions of this court in the two former cases does not call for serious consideration.

The claim that the United States should pay rent for the use of the property of the appellants from the date of the establishment of the fortification down to the present time, except in so far as the statute of limitations imposes a bar, is simply a presentation in a

new form of a question which has been twice decided by this court. As such, the case is *res adjudicata*. If the acts involved in the two previous suits did not involve a taking of the land, it seems clear by parity of reasoning that those earlier acts did not involve a using which rendered the Government liable for the payment of rent through those years. Even if it should be held that the acts and incidents involved in the present suit subject the United States to liability, that liability is not thereby extended back over prior years. This is not an action of tort, and for that reason it is not necessary to consider whether a later trespass could be so bound up with prior acts as to make the entire course of action a *trespass ab initio*. If the acts involved in this suit create any liability on the part of the Government, that liability clearly is not retroactive.

Moreover, the conduct of the appellants has not been consistent with the claim which they now set up. If the Government had either rented or taken the property, the appellants would have had no right to use the hotel and other property involved after the taking occurred or the renting began, and they would have had no right to tear down the hotel if it or the use of it had belonged to the Government.

The actions of the Government in connection with this fort do not collectively constitute a taking or continuous using of the appellants' land.

If, when considered by themselves, the actions of the Government since the decisions in the two previous cases do not render the Government liable, they

do not constitute a taking or continuous using of the land when considered in connection with the acts involved in the two previous cases, as to which no liability attached.

The several instances of firing brought out in the three cases, if they had not been separated by long intervals of time and if not otherwise explained, might in the aggregate be regarded as proof that the guns had been discharged for practice purposes. But it has been shown in the two previous suits that the firing there considered was not for the purpose of practicing (*Peabody* v. *United States*, 231 U. S. 530, 537; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 53 Ct. Cls. 210, 216; R. 24, 25), and the most natural inference from the facts set forth in the petition in the present case is that there was another reason for discharging the guns. (P. 7, supra.)

It is true that the appellants' brief repeatedly suggests that there might have been more firing if suits had not been pending, but such suggested reasons are not equivalent to actual firing. Moreover, it may be pointed out that the appellants brought the present suit before there had been any fresh instance of firing and that the firing was done when necessary regardless of the pendency of the suit.

It has not been shown, either by separate incidents or by the course of events, that any of the actual firing from this fort has been done for the purpose of practicing.

II.

CORRECTION OF ALLEGED ERRONEOUS FINDINGS OF FACT IN THE SECOND SUIT.

It is submitted that the only matter in issue in this suit is the conduct of officers of the Government which this court has not already considered in the two previous cases.

The appellants, however, contend that the Court of Claims erred in denying an application in equity for the correction of alleged erroneous findings of fact in the second suit. While those findings can have no bearing upon the present action, and while the sole basis for the equitable relief sought was presented to this court in the second suit in a motion to remand which was denied (250 U. S. 1), the Government feels that the method of practice which the appellants are attempting to establish would be so subversive of orderly procedure in the Court of Claims as to justify a defense of that court's action in refusing to grant their request.

The Court of Claims committed no error in denying the present application to its equitable jurisdiction to correct alleged erroneous findings of fact in the preceding action at law.

THE FACTS.

In the first of this series of cases, after the decision of the Court of Claims, the claimants filed three separate motions for new trials, and after those three motions had been overruled they appealed to this court.

In the second case, according to their allegations in this third case (R. 4–5, 18–19), one of their counsel of record by mistake, and through a misunderstanding of the intention of the principal attorney, took and perfected an immediate appeal from the judgment of the Court of Claims and, in consequence, the findings of that court were not reviewed therein in the usual manner on motion for new trial or rehearing.

It may be pointed out that in the second case the claimants filed in this court a motion to remand the case to the Court of Claims for additional and amended findings, and incorporated in their application an affidavit as to the circumstances of the immediate appeal which also appears in the third case as Exhibit D. Concerning the application to remand, this court, speaking by the Chief Justice, said (250 U. S. 1, 2):

> The record discloses no ground for the applications here made to remand and for additional findings.

In their petition in the third suit the claimants allege that by reason of the misunderstanding as to the taking of an appeal the Court of Claims in the second case had no opportunity to correct various errors in the findings, some of which, it is alleged, were contrary to the evidence submitted and others stated as facts things physically impossible. And the Court of Claims was requested in the third case, in the exercise of its equitable powers, to set aside the findings in the second case in so far as they worked

inequity upon the claimants and to make necessary amendments and corrections.

APPELLANTS' MOTION TO REMAND IN THE SUIT IN WHICH THE DISPUTED FINDINGS WERE ENTERED.

After the docketing of the appeal in the second case in this court the Court of Claims could not grant a new trial. (*Ex parte Russell*, 13 Wall. 664, 670, 671; *Ex parte Roberts*, 15 Wall. 384, 387; *Monroe* v. *United States*, 37 Ct. Cls. 79.) The claimants, however, filed in this court a motion to remand the case to the trial court for additional and amended findings. They incorporated in their motion to remand the identical affidavit concerning the premature filing of the appeal which appears as Exhibit D of the present petition.

This motion was denied (250 U. S. 1, 2).

NO GROUNDS FOR EQUITABLE RELIEF WERE SHOWN IN THE PETITION.

Despite this direct decision by this court, the claimants again urge this tribunal to direct the Court of Claims to amend its findings in the second suit. And they further assert that the Court of Claims erred in refusing in the present action, as a court of equity, to set aside those findings and make corrected ones. All this presents a *res adjudicata*.

Assuming for the moment that the Court of Claims had equitable power in the premises, did the petition make such a showing as would have warranted the court in granting the relief prayed? It should be

borne in mind that the challenged findings were made in an action at law. The appellants' view is that where a law court by *mistake* adopts erroneous findings and by *accident* is denied opportunity to correct such findings, a case for equitable interposition is presented. (Appellants' brief, p. 29.) But it is well settled that equity will not give relief simply because of mistake or error in a judgment at law, or because a court of equity in deciding the same questions might have come to a different conclusion than the law court. (Story, Equity Jurisprudence (14th ed.), vol. 3, par. 2042, p. 590.)

Nor can appellants successfully base their claim for relief upon the ground of accident, for this court has said that one who seeks relief in equity against an adjudication at law on the ground of accident or mistake alone, unmixed with fraud (and there is no allegation of fraud in the present case), "*must show entire freedom from fault or neglect on the part of himself and his agents.*" (*Pickford* v. *Talbott*, 225 U. S. 651, 658. See also *United States* v. *Ames*, 99 U. S. 35; *Crim* v. *Handley*, 94 U. S. 652.) How appellants can claim, as they do, an entire absence of fault or neglect under the circumstances of the case, it is hard to conceive. If they were in any way prejudiced by their failure to have the Court of Claims review its findings, it was solely because of the precipitancy of their counsel.

Since the practice of awarding new trials in courts of law has become established, equity has become more and more reluctant to review adjudicated cases

at law. Appellants had their opportunity in the court of law to secure a review of the challenged findings, and their loss of that opportunity, whether through inattention, neglect, or poor judgment by their counsel, can hardly form a sufficient basis for a court of equity to deprive the Government of the benefit of its judgment.

THE LIMITED EQUITABLE JURISDICTION OF THE COURT OF CLAIMS SHOULD NOT BE EXTENDED TO PERMIT THE GRANTING OF A FORM OF RELIEF WHICH CONGRESS HAS INDICATED THE COURT SHOULD WITHHOLD FROM THE PRIVATE LITIGANT AND WHICH WOULD RENDER IMPOTENT RULES PRESCRIEED BY SAID COURT.

The equitable jurisdiction of the Court of Claims is, at most, a very limited one. It may, it is true, re-form a contract where that is necessary to enable it to award a money judgment for breach of the contract as re-formed. (*United States* v. *Milliken Imprinting Co.*, 202 U. S. 168.) But, on the other hand, this court has said that the Court of Claims is without power "to grant a decree for specific performance or exercise the peculiar powers of a court of equity." (*District of Columbia* v. *Barnes*, 197 U. S. 146, 152.) Thus, in *United States* v. *Jones* (131 U. S. 1), where the appellees had purchased certain timber lands from the United States, it was held that the Court of Claims could not compel the issuance and delivery by the Government of patents for those lands.

That such a method of procedure as is here attempted to be established by the appellants was not only not contemplated by Congress in defining the jurisdiction and powers of the Court of Claims, but was, impliedly at least, recognized by that body as being denied to the private litigant is established by the language of section 175, Judicial Code, which reads:

> The Court of Claims, at any time while any claim is pending before it, *or on appeal from it, or within two years next after the final disposition of such claim*, may, *on motion on behalf of the United States*, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States * * *. (Italics ours.)

This section provides the Government a remedy of practically the same nature as a suit in equity to avoid fraud, wrong or injustice practiced in an adjudicated action at law. (See *Ex parte Russell*, 13 Wall. 664, 669.) The silence of Congress as to a like remedy for the defeated private litigant is peculiarly significant.

A decision extending the limited equitable jurisdiction of the Court of Claims so as to embrace such a proceeding as the present one would mean not only that there is no potency or meaning in the rule of the Court of Claims requiring, at least so far as the private litigant is concerned, that a motion for amendment or correction of its findings of fact must be

made within 60 days from the date of judgment, but that a jurisdiction was being conferred upon that court which Congress indicated should be withheld from it. Under such a holding a defeated claimant would be permitted to allow the findings of the Court of Claims to go unchallenged for a period suiting his pleasure, and then, when the case had long since become hazy in the minds of court and Government counsel and was thought to have been fully adjudicated, institute an equitable proceeding having for its object the complete overturning of the findings in the previously decided action at law. Such a practice would not only be destructive of orderly procedure in the Court of Claims, but a source of never-ending litigation. What a noted legal writer has said in another connection may well be said here, "Appeals must terminate, controversies must cease, discussions must end, and the business of life proceed." (Sedgwick, Construction of Statutory and Constitutional Law, 2d ed., p. 154.)

THE PRESENT APPLICATION, LIKE THE MOTION TO REMAND IN THE PRECEDING SUIT, PRACTICALLY REQUESTED A NEW TRIAL IN THE COURT OF CLAIMS; BUT THIS COURT HAS HELD, AS TO THE PLEA TO REMAND, THAT THERE WAS NO GROUND FOR SUCH APPLICATION.

Like a special verdict by a jury, it is only where there is obviously *no* evidence to support a finding of fact by the Court of Claims, or where a finding is *inconsistent* with other facts found, that this court will consider itself as not bound by the same. (*Hatha-*

way & Co. v. *United States*, 249 U. S. 460, 463.) Appellants, however, can hardly raise such questions at this time, for they moved in this court in the action in which the challenged findings were made to have the case remanded "for such other findings and amendments of findings as to the Court of Claims shall seem proper." In other words, what they practically asked for in their motion to remand was that this court should order a new trial in the Court of Claims. But this court in plain and unmistakable language said that the record disclosed no ground for the application to remand. (250 U. S. 2.) How, then, can the appellants stand in any better position in their present effort to induce this court, in effect, to direct the Court of Claims to grant them a new trial?

CONCLUSION.

This court may wonder why the Government is at such pains to demonstrate the unsoundness of the appellant's contention; but if this court should, under the circumstances of this case, allow a recovery on the theory of a taking, because of the anticipated use of coast defenses, it is difficult to see where such a decision would stop.

Sandy Hook is one of the most powerful coast defenses in the world. It protects the entrance to New York Harbor. About it are thousands of costly summer homes. During the World War the great guns of Sandy Hook were repeatedly fired to demonstrate their usefulness, and the effects of the concussion could be felt for many miles. It would

surprise the numerous owners of residential properties in the neighborhood of Sandy Hook (among whom is the Solicitor General) to know that the occasional firing of the Sandy Hook guns was a taking of all the summer residences in the vicinity, whose owners were temporarily and inevitably inconvenienced by the concussion. If so, the Sandy Hook fortifications would mean a loss to the Government of many millions of dollars, and it seems inconceivable that so necessary a protection for the great harbor of New York can not be maintained without the appropriation of residential properties for miles around and the payment therefor. Those who own homes in the neighborhood of fortifications for the national defense must, as good citizens, be willing to suffer a temporary inconvenience for the common welfare.

The decision of the Court of Claims should therefore be affirmed. It is hoped that this decision may end a controversy which has been too long prolonged.

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

NOVEMBER, 1922.

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The Supreme Court of the United States.

October Term, 1922—No. 97.

PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, *et als.*, *Appellants*,

vs.

THE UNITED STATES, *Appellee.*

APPELLANTS' SUPPLEMENTARY BRIEF IN REPLY.

I. This Court has held ~~that~~ where there is a premature appeal from the Court of Claims resulting from a mistake of counsel acting under a misapprehension of fact that the Court of Claims ought to remedy the situation resulting from such premature appeal where it works prejudice to claimant. *Ex parte Roberts*, 15 Wall., 384. In this case claimant, after an adverse judgment below, filed motions for a new trial and for allowance of appeal simultaneously. While both these motions were pending counsel for claimant without assent or knowledge of the attorney of record, moved for allowance of appeal and the appeal was allowed. Realizing his mistake counsel then moved for and obtained a revocation of the allowance of appeal, the record still being in the Court of Claims. When the motion for a new trial came for hearing the court refused to entertain it on the ground that the allowance of an appeal had deprived it of jurisdiction and that the subsequent order revoking the allowance of appeal was a nullity. Claimant then moved

to strike out the allowance of appeal. This motion was denied. Mandamus was brought in this Court to require the Court of Claims to hear the motion for a new trial and to correct its records. This Court granted the mandamus, the Chief Justice saying: "It cannot be denied that the order allowing the appeal was improvidently made. It was moved for without authority, or if with authority, under a total misapprehension of fact and in disregard of the stipulation entered into by the attorneys in the cause."

II. The brief for the government fails to meet squarely the essential question whether the land in suit is now subordinated to the use of the fort and is now a mere adjunct of the fort in deprivation of its use by the owners. It is no reply to this question to argue that a single firing in 1920 does not constitute a taking. The answer which is required is whether in the light of what has developed since 1915, taking the subsequent events and present conditions in connection with the former status, this land has not been reduced to a mere adjunct of the fort? If the facts are as stated in the petition, the fort is useless without the future use of this land and the land is useless to the owners with the fort maintained as at present, because

1. To fire over it constitutes the domination *pro tanto* of the land fired over.

2. To establish and occupy fire control stations on the land is a use and occupation.

3. To point and range the guns over the land renders it impossible for human habitation with any reasonable degree of comfort.

4. To put a fort where the lay of the land in front is used as cover and hiding is unjustly to enrich the United States at the expense of the land owner where such land is ruined by the presence of a fort which always threatens to fire over it.

5. The attempt of the government to buy the land is a pretty good indication of the fact that it is needed and that the fort is no good without it. The value of this land to the owners has disappeared. Where has its value gone? It has been transferred to the United States.

III. How could a more complete taking be shown?

1. By firing guns every day—

but such frequent firing is abnormal and not to be expected. No forts anywhere do it. "Whenever it sees fit" must mean firing such as normally is done in the reasonable use of a fort of this character situated as is this fort. Such forts may be assumed to average about one shot a year more or less. If this be not enough, what would be sufficient? One shot a week? One shot a month?

A little thought shows that it is not the number of shots that constitutes the imposition of a servitude, but the shooting at irregular intervals and unforeseen times coupled with the power and will to do so at pleasure.

This we have. It would add nothing should the guns be fired every day.

2. By putting up more fire control stations on this land—

but in principle going on another's land and putting up two structures constitutes a use of that land just as much as putting up a row of houses on it. The measure of damages might vary, but a demurrer would lie as little against a claim for use and occupation for the one as for the other.

3. By purchasing the land outright—

but submitting an offer and getting an option on land is a step toward purchase and just as strongly tends to show that the would be purchaser desires the property as a consummated purchase.

4. By seizing it with a military force—

but pointing guns at it is just as effective in forcing the owners to leave it at the mercy of the government.

5. By declaring that the land is needed for the use of the fort—

but the topographic fact that the land constitutes a natural cover and masks the battery, and that the fort can only be fired over this land and not elsewhere silently shows that the fort needs this ground. Words are not needed.

IV. The government does not meet our argument, which we need not repeat in detail, and does not explain away the following points which we think we have established.

1. Normal, reasonable people will not go for pleasure to a place where they fear at any time a great gun may be fired at them.

2. The United States has gone upon this land and put in fire control stations there.

3. The United States has sought an option to buy the land, but has not bought it, presumably only because the War Department could not find the money to pay for it.

4. The United States has, after taking down the guns, re-established the same or other ten-inch guns in the same place, showing the intention to maintain this fort.

5. The land forms a natural cover for the guns.

6. The re-established guns have been fired and are pointed in simulation of firing from time to time, thus constituting a continuous threat.

We submit that it is clear that a servitude has been imposed on this land, which makes it a mere adjunct of the fort, and that it ought to be paid for and these claimants given their just rights by compensation for past use and recompensed for the value of what has been taken from them.

Respectfully submitted,

CHAUNCEY HACKETT,
Attorney for Appellants.

Mr. Solicitor General Beck, with whom *Mr. Robert P. Reeder*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a claim in respect of land which, or an interest in which, is alleged to have been taken by the United States Government. Similar claims in respect of the same land based upon earlier acts of the Government have been made before and have been denied. *Peabody* v. *United States*, 231 U. S. 530. *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1. But it is urged that the cumulative effect of later acts added to those that have been held not enough to establish a taking leads to a different result.—The land is on Gerrish Island, lying east of the entrance to Portsmouth Harbor, and borders on the ocean. Its main value is for use as a summer resort. Adjoining it to the north and west lies land of the United States upon which the Government has erected a fort, the guns of which have a range over the whole sea front of the claimants' property. In the first case it was decided that the mere erection of the fort and the fact that guns were fired over the claimants' land upon two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States. The second case was like the first except for "some occasional subsequent acts of gun fire," 250 U. S. 2, and the finding of the Court of Claims for the United States again was sustained.

The present case was decided upon demurrer. The question therefore is not what inferences should be drawn from the facts that may be proved but whether the allega-

tions if proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that "if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538. That proposition we regard as clearly sound. The question is whether the petition before us presents the case supposed.

It is alleged that after dismounting the old guns for the purpose of sending them to France during the late war, the United States has set up heavy coast defense guns with the intention of firing them over the claimants' land and without the intent or ability to fire them except over that land. It also, according to the petition, has established upon that land a fire control station and service, and in December, 1920, it again discharged all of the guns over and across the same land. The last fact, although occurring after this petition was filed, may be considered as bearing on the intent in establishing the fire control. If the United States, with the admitted intent to fire across the claimants' land at will should fire a single shot or put a fire control upon the land, it well might be that the taking of a right would be complete. But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient

time may prove it. Every successive trespass adds to the force of the evidence. The establishment of a fire control is an indication of an abiding purpose. The fact that the evidence was not sufficient in 1905 does not show that it may not be sufficient in 1922. As we have said the intent and the overt acts are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed.

It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land, *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.

Judgment reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE SUTHERLAND concurs.

I agree that, in time of peace, the United States has not the unlimited right to shoot from a battery over adjoining

private property, even if no physical damage is done to it thereby; that a single shot so fired may, in connection with other conceivable facts, justify a court in finding that the Government took, by eminent domain, the land or an easement therein; and that such taking, if made under circumstances which give rise to a contract implied in fact to pay compensation, will entitle the owner to sue in the Court of Claims. But the question here is not whether the facts set forth in the petition would alone, or in connection with other evidence, justify the court in finding such a taking and the implied contract. The case was heard on demurrer to the petition; the facts therein set forth must, therefore, be taken as the ultimate facts; and they must be treated as are the findings of fact made by the Court of Claims. These are treated like a special verdict and not as evidence from which inferences may be drawn. Rule I of this Court relating to appeals from the Court of Claims; *Crocker* v. *United States*, 240 U. S. 74, 78; *Brothers* v. *United States*, 250 U. S. 88, 93. Unless, therefore, the petition sets forth facts well pleaded, which if found by the lower court would as matter of law entitle the claimants to a judgment, the lower court was, in my opinion, right in dismissing the petition.

Appropriation by the United States of private property for public use, without instituting condemnation proceedings, does not entitle the owner to sue under the Tucker Act (Judicial Code, § 24, par. 20), unless the taking was made under such circumstances as to give rise to a contract express or implied in fact to pay compensation. *Hill v. United States*, 149 U. S. 593; *Schillinger* v. *United States*, 155 U. S. 163, 168–171; *Belknap* v. *Schild*, 161 U. S. 10, 17; *John Horstmann Co.* v. *United States*, 257 U. S. 138, 146. Hence this action must rest on a contract, express or implied in fact. *Harley* v. *United States*, 198 U. S. 229; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232; *William Cramp & Sons Co.* v. *Curtis Turbine*

Co., 246 U. S. 28, 40, 41. There is no suggestion of an express promise; and there is not to be found in the petition, or in the exhibits incorporated by reference, a single allegation, however general, of an implied contract. This omission would not be fatal, if the petition set forth the facts essential to the existence of the cause of action. But it does not. An appropriation of private property will not entitle the owner to recover if made by mistake or if made under a claim of right, although the claim is later shown to be unfounded. *Tempel* v. *United States*, 248 U. S. 121, 130, 131. And, if the appropriation was made by an officer without authority, the claimant is likewise without this remedy against the Government. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330, 333. The essentials of a recovery are a taking on behalf of the United States, made by officials duly authorized, and under such conditions that a contract will be implied in fact. The petition fails to set out such facts. Indeed, the facts which are set out make it clear that what was done did not constitute a taking; that the officers of the Government in doing what they did, had no intention of subjecting it to any liability; that they were not authorized to take the land or an easement therein; and that they consistently denied that claimants were entitled to compensation. Implied contracts in fact do not arise from denials and contentions of parties, but from their common understanding whereby mutual intent to contract without formal words therefor is shown. *Farnham* v. *United States*, 240 U. S. 537; *E. W. Bliss Co.* v. *United States*, 253 U. S. 187, 190, 191; *Knapp* v. *United States*, 46 Ct. Clms. 601, 643.

The petition sets forth the proceedings in the two earlier cases, *Peabody* v. *United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U. S. 1. Those judgments make *res judicata*, not only the fact that there was no appropriation prior to 1918, but

also the facts specifically found in the second suit concerning the erection and maintenance of the battery, the policy and practice of the military authorities, and their intentions when the guns were discharged prior to that date. Among other things, as the petition states, the court found that the shots were fired for the purpose of testing certain modifications of the gun carriages made shortly prior thereto; that in so firing the guns the officers and agents of the United States especially desired, intended, and took precautions so to fire them and believed they were so firing them, as to avoid firing any of them over any part of claimants' land; that such firing as was done over said land was due to a misunderstanding on the part of said officers and agents as to the boundaries of said land; that the fort was not constructed for the purpose of firing any of its guns over and across any of claimants' lands in time of peace, or of so firing them at all, except over the Government's own premises occasionally for testing purposes; that the fort was never garrisoned; that no target or practice firing was ever done there; that until 1917, when its guns were dismounted for removal and use elsewhere, its batteries had been continuously kept in serviceable condition for defensive use by a small detail from Fort Constitution, across the harbor; and that it was the policy and practice of the military authorities not to maintain garrisons and train gun crews at all of its coast fortifications, but to maintain garrisons and do such training at fortifications where the facilities for training are best and where there was, or naturally would be, less objection and complaint by nearby residents on account of the noise and concussion.[1] The only later occurrences,

[1] The facts concerning the establishment and earlier use of the battery found in the first suit, were:

By Act of February 21, 1873, c. 175, 17 Stat. 468, 469, Congress appropriated $50,000 for batteries in Portsmouth Harbor, on Gerrish Island and Jerry Point, and by Act of February 10, 1875, c. 39, 18

material to the issue, which are set forth in this suit, in the petition as amended, are the re-installation of the guns at the battery after the Armistice, the erection of a fire control station on claimants' land in connection therewith, and firing the guns on December 8, 1920.

This suit was begun in February, 1920. The original petition set forth the facts found in the earlier cases; and

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Stat. 313, added to the appropriation for the Gerrish Island battery, $20,000. Under the authority thus conferred a tract of 70 acres abutting claimants' land was purchased in 1873, and construction was begun. After $50,000 had been expended in substantially completing the breast-high walls of the fortification, the work was suspended for lack of appropriations in 1876; and it was not resumed until funds were allotted out of the general appropriation made by the Act of May 7, 1898, c. 248, 30 Stat. 400, for fortifications and like purposes. Then, on the site of the old, uncompleted battery, there was constructed the battery now known as Fort Foster; and in December, 1901, it was transferred to the Artillery. In June, 1902, the Government fired two of the guns, and in September, 1902, another, for the purpose of testing guns and carriages, off the coast; and in so doing it fired across complainants' land. Between that time and 1911 no gun was fired from the fort. This battery is located within 200 feet of a corner of claimants' land; no part of the fort encroaches upon it; but the guns there installed had a range of fire over all its sea front; and whether the guns then installed could have been fired for practice or other necessary purpose in time of peace without shooting over claimants' land depends upon a question of law concerning ownership of a narrow strip of land over which the guns had a range of fire—a question as to which the parties were and so far as appears are still in dispute. It was not, so far as then appeared, the intention of the Government to fire in time of peace any gun already installed or which might thereafter be installed, over and across the claimants' land, so as to deprive them of the use of the same or to injure them, except as such intention can be drawn from the fact that the guns then installed were so fixed as to make it possible so to do and the fact that they had been fired as stated. On these facts found by the Court of Claims, 46 Ct. Clms. 39, that court and this held, that there was no basis for the claim that the Government had appropriated the land and impliedly agreed to pay for it. *Peabody* v. *United States*, 231 U. S. 530.

substantially nothing more except the intention to reinstall the guns. It was devoted largely to pointing out errors in the earlier findings for which it sought relief through the equity powers of the court. The only new fact then alleged, which may be deemed material, was "establishing [on claimants' land] a fire control station and service for use of the fort." The reinstallation of guns, and the firing in December, 1920, were first set up by an amendment filed in 1921. And it is by this reinstallation after the commencement of this suit, that the United States is alleged to have established the fort as a part of the permanent coast defense.[1] If there was no taking until the guns were installed and the shots fired in December, 1920, then there was no cause of action when this suit was brought; and the demurrer was properly sustained on that ground. See *Court of Marion County* v. *United States*, 53 Ct. Clms. 120, 150. And there is this further obstacle to the maintenance of the suit. We take judicial notice of the fact that on December 8, 1920, the United States was still at war with Germany and Austria-Hungary. Joint Resolution of March 3, 1921, c. 136, 41 Stat. 1359. That the Government has in time of war the right to shoot over private land was assumed in *Peabody*

[1] The amendment alleges:

"And in so doing the United States have established the said fort and battery with the said guns as a part of the permanent establishment of the coast defense fortifications maintained by [it] . . . without intending to fire, or being able to fire, the said guns to sea except over and across the said land. And the United States have used the said land of the said claimants for the establishment of a fire control station and service for the use of said fort. The United States have since setting up the said guns, as aforesaid, at frequent intervals in the use of the said fort, raised the said guns and pointed them as aforesaid, over and across the said land, and have, further, in the use of the said fort, discharged all of the said guns as aforesaid, on or about the eighth day of December, 1920, over and across the said land."

v. *United States*, *supra*, and is not disputed. See also, *Peabody* v. *United States*, 43 Ct. Clms. 5, 18. The Armistice signed November 11, 1918, left the United States possessed in December, 1920, of the same power to fire over claimants' land as if war had then been flagrant. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 158–160. Reinstallation of the guns and testing them by firing was an appropriate precautionary measure in view of a possible renewal of the conflict. Thus, the only overt acts upon claimants' land which are alleged to have occurred after the date of the findings in the earlier cases, and which are relied upon as establishing a taking after entry of the judgment in 250 U. S. 1, appear to have been acts done in the exercise of a right already possessed without a taking.

It is said that the petition alleges, in general terms, a taking and intention to take by the United States; that this allegation alone, although general, is an allegation of all the facts necessary to give a cause of action; and that the specification in detail of the facts relied upon may be treated as surplusage. To this contention there are several answers. The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain concise statement of the facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling* v. *United States*, 23 Ct. Clms. 361; *Atlantic Works* v. *United States*, 46 Ct. Clms. 57, 61; *New Jersey Foundry & Machine Co.* v. *United States*, 49 Ct. Clms. 235; *United States* v. *Stratton*, 88 Fed. 54, 59. If the suit had rested upon a statute which provides that the owner of property appropriated shall receive compensation, a fairly general statement that the property had been taken might be sufficient; for, in such a case, the obligation to pay would follow as a conclusion of law. But here, there

is no such statute; the mere fact of appropriation would not raise a promise implied in law; hence, claimants were obliged to set forth additional facts to show that the Government intended to pay the claimants compensation. Moreover, the general allegation of taking was not left to stand alone. Claimants set forth, in great detail, the facts upon which they rely as constituting a legal taking; they have done it in such a way that the allegation of taking reads now, not as an allegation of fact, but as a statement by the pleader of a conclusion of law; and consequently is not admitted by the demurrer. *Pierce Oil Corporation* v. *City of Hope*, 248 U. S. 498, 500. And for a further reason, the facts set forth in detail may not be disregarded as surplusage. They negative the existence of a cause of action. *Randall* v. *Howard*, 2 Black, 585; *McClure* v. *Township of Oxford*, 94 U. S. 429; *Speidel* v. *Henrici*, 120 U. S. 377. The facts stated show, as indicated above, not only an absence of taking and of intention to take the claimants' property, but also an absence of authority to do so in those who did the acts relied upon.

The petition alleges in terms authority in the Secretary of War to take the land. But in setting forth the facts relied upon, the pleader has disclosed the absence of authority from the Secretary of War to the officers by whom the taking, if any, must have been made. Claimants seek in their suit to recover $820,000. They assert that the land is worth $700,000. For the fifteen years preceding the commencement of this suit, there had been active litigation in which claimants had strenuously asserted that there was a taking and the United States had throughout denied that it had taken, or intended to take, any property of claimants. Unless the Secretary of War conferred upon his subordinates who made this alleged taking authority to take this land or an easement therein, the Government can, in no event, be made liable. *United States* v. *North American Transportation & Trading Co.*,

PORTSMOUTH HARBOR LAND & HOTEL COMPANY ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 97. Argued November 15, 1922.—Decided December 4, 1922.

1. The petition alleged that the United States, after having several times in the past discharged its battery over petitioner's land, reinstalled its guns with the intention of so firing them, and without intention or ability to fire them otherwise, established a fire control and service upon that land, and again discharged all of the guns over and across it. A taking by the United States was alleged as a conclusion of fact from these specific acts, and damages were claimed. *Held*, that the taking of a servitude, and an implied contract to pay, might be inferred; and that a demurrer to the petition should not have been sustained. P. 328.
2. Where acts amount to a taking of property by the United States, without assertion of an adverse right, a contract to pay may be implied whether it was thought of or not. P. 330.

56 Ct. Clms. 494, reversed.

APPEAL from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. Chauncey Hackett, with whom *Mr. John Lowell* was on the briefs, for appellants.

253 U. S. 330, 333, 334. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 54–57. If the present case had proceeded to a trial on the facts, claimants could not have proved authority in the subordinate officers to acquire this land or an interest therein, by showing merely that they were authorized to reinstall the guns and to test them after installation. That is exactly what they had done before and which the courts found did not constitute a taking. An authority to take land by purchase or by eminent domain is not conferred by the Secretary of War merely because he has authorized, directly or indirectly, certain discharges of guns for testing or other purposes. We must take judicial notice, that to acquire land for fortifications is not, and was not, within the powers ordinarily conferred upon the Ordnance or upon the Artillery. We know that by Act of July 2, 1917, c. 35, 40 Stat. 241, provision was made for speedy acquisition by the Secretary of War, by means of condemnation or purchase, of any land, temporary use thereof or interest therein, needed for the site, location, construction or prosecution of works for fortification or coast defenses; that upon filing a petition for condemnation, the immediate possession thereof to the extent of the interest to be acquired could be obtained; and that by passage of this act the occasions for taking interests in land without first instituting condemnation proceedings had been largely removed. We know that by Act of June 30, 1906, c. 3914, 34 Stat. 764, a contract involving payment of money may not be made in excess of appropriations. 30 Ops. Atty. Gen. 147, 149. We know that Act of March 3, 1919, c. 99, § 6, 40 Stat. 1305, 1309, required that estimates of appropriation for fortifications and other defense works for the year beginning July 1, 1920, be submitted to Congress in the Book of Estimates. And we may take judicial notice of the fact that in submitting estimates of the amount needed for the year beginning

July 1, 1920, "For procurement or reclamation of land, or rights pertaining thereto, needed for site, location, construction, or prosecution of work for fortifications and coast defenses," the Secretary of War asked for only $15,000 for the whole country for all these purposes; and that no part of that amount was allocated in the estimates to the "Purchase of land and interest in land." Estimates of Appropriation, 66th Cong., 2d sess., Doc. 411, pp. 531, 532. The facts alleged and of which we take judicial notice show not only an absence of intention to take, but the absence of power and authority to take.

The principle on which, under certain conditions, compensation may be recovered in the Court of Claims for private property appropriated for public purposes without condemnation proceedings, leaves unimpaired the long established rules that the United States is not liable for its torts, nor for unauthorized acts of its officers and agents, although performed in the ordinary course of their business and for the benefit of the United States. The Tucker Act merely gives a remedy where the essential elements of contractual liability exist. It does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law, as in case of unjust enrichment, *Sutton* v. *United States*, 256 U. S. 575, 581, or when a plaintiff waives a tort and sues in contract. *Hijo* v. *United States*, 194 U. S. 315, 323; *Hooe* v. *United States*, 218 U. S. 322. The fact alleged in the petition that at some time in 1919 the War Department offered to purchase part of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative authorization to make the taking asserted in this suit. That the offer was not accepted

and that the Government did not institute condemnation proceedings may tend to show that officers of the United States committed a tort on its behalf; but, if a tort was committed, the remedy lies with Congress, not with the courts.